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THE PHILOSOPHY OF COLONIZATION UNDERLYING TAXATION IMPOSED UPON TRIBAL NATIONS WITHIN THE UNITED STATES

Angelique A. EagleWoman*

(Wambdi Awanwicake Wastewin)**

This article will review the philosophical foundations of colonialism in regard to the imposition of United States taxing authority within Indian Country. First, the legal status of Tribal Nations as sovereigns within mid-North America will be set out in conjunction with the sovereign authority to impose taxation. Second, the history of taxation within Indian Country by the United States federal government and the individual states composing the United States will be examined. Third, an examination of the philosophical considerations underlying imposition of federal and state taxes in Indian Country will be presented. The final section will focus on the problems inherent in the current structure and the consequences of those problems for the financial well-being of Tribal Nations.

I. THE STATUS OF TRIBAL NATIONS AS SOVEREIGN AND THE MAINTENANCE OF TRIBAL GOVERNMENT

Tribal Nations are inherently sovereign by internal definition as well as by classic European political science theory. Sovereignty is defined by Euro-American theory as "the international independence of a state, combined with the right of power of regulating its internal affairs without foreign dictation."\(^1\) Tribal Nations have historically been self-sufficient entities which negotiated agreements with foreign powers and continue to govern themselves internally.\(^2\) The political structures of Tribal Nations

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** Author's Dakota name translates to "Good Eagle Woman Who Takes Care of the People."


2. Wendell H. Oswalt, *This Land Was Theirs* 36 (7th ed., McGraw-Hill Mayfield 2002) ("Until the early 1800s, treaty negotiations were between governments, which established the basis for Indian laws and policies. The sovereignty of tribes was fully recognized by European colonial powers and initially, by the United States.")
will be generalized in this article for the sake of brevity, but there are salient characteristics for the majority of these nations.\(^3\) The tribal political structures are interwoven with the social, spiritual, intellectual, and economic aspects of the communities they serve.\(^4\) The values inherent in Tribal Nations have a distinct effect on the process by which the people chose to create and maintain government. For Tribal Nations, government is outside of a social contract or a question of linear evolutionary development.\(^5\)

Rather, tribal government in its historical sense was first and foremost based upon relationship and the family structure within a worldview of spiritual connectedness.\(^6\) The roles of men and women were respected and given generally separate realms of governance although overlap was possible dependent upon individual personalities.\(^7\) Organizations within tribal societies served the various functions of governmental agencies (i.e. akicita [warrior] societies which are akin to current law enforcement, clan structure which carried out specific group regulatory functions, and women’s societies focused on value preservation).\(^8\) Beginning in this historical context, Tribal Nations did not have a tax on citizenry because the citizenry voluntarily contributed to support each other and the functions of government.

One of the most well-known values of Tribal Nations is the widespread practice of wealth sharing exemplified in the “give-away” and known as the potlatch in the northwest.\(^9\) At any significant point of life (i.e., acceptance of a leadership position, 

\(3.\) See Sharon O’Brien, *American Indian Tribal Governments* 14 (U. Oklahoma Press 1989) (“Despite differences in structure, however, traditional tribal governments shared certain values, ideas of leadership, and styles of decision making.”).

\(4.\) See Vine Deloria, Jr. & Clifford M. Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* 18 (U. Texas Press 1998) (“Within an Indian tribal society ... the simple fact of being born establishes both citizenship and, as the individual grows, a homogeneity of purpose and outlook. Customs, rituals, and traditions are a natural part of life, and individuals grow into an acceptance of them, eliminating the need for formal articulation of the rules of Indian tribal society.”).

\(5.\) Id. at 17–18.

The most profound and persistent element that distinguishes Indian ways of governing from European-American forms is the very simple fact that non-Indians have tended to write down and record all the principles and procedures that they believe essential to the foundation and operation of a government. The Indians, on the other hand, benefiting from a religious, cultural, social, and economic homogeneity in their tribal societies, have not found it necessary to formalize their political institutions by describing them in a document.

\(6.\) Jerry H. Gill, *Native American Worldviews* 178 (Humanity Bks. 2002) (“The thread that held these two aspects of community life, familial and political, together was the ceremonial pattern.”).

\(7.\) Most Tribal Nations have accounts of women warriors engaging in war and accounts of men who participated successfully in culinary arts and such.


The political organization of groups was diverse, as loyalties were based on varied sources of obligation and affinity. In groups where clan ties were strong (among the Iroquois and Muskogees, for example), they formed the deepest bonds of obligation. Clans were seen as a source of power, membership assuring otherwise independent individuals a broad base of allies. These kinship ties were extended and strengthened through marriage and trade and united residents of different villages. The clans were organized to promote the social and political welfare of their members.


No less important is the role which honour plays in the transactions of the Indians. Nowhere else is
birth of a child, success in hunting, etc.), the family celebrating held a give-away and all but essential personal and spiritual items were given to fellow citizens at large. This distribution of income was voluntary and expected to show proper gratitude for a life event and to practice the art of generosity. The extended family joined in and donated items for the give-away. There was no fear that destitution followed the give-away because in due course another give-away would be held and so on. The cycle of the give-away provided honor to those who gave and provided a livelihood for those who received. In this closed circuit, each segment of society was interdependent as those skilled and talented rose to leadership by fully giving to those who were needy.

In addition, the giving and receiving of gifts created relationships that expanded trade circles leading to commerce networks to support the tribe’s continued prosperity. Well-developed trade networks reached from coast to coast in North America carrying a variety of products including “pipe clay, copper, corn, nets, and rope.” Extravagant wealth accumulation was viewed as antithetical to tribal existence. However, tribal members did enjoy prosperity, participated in extensive routes comprised of trading markets, established trading practices, and had ample leisure time. In essence,

the prestige of an individual as closely bound up with expenditure, and with the duty of returning with interest gifts received in such a way that the creditor becomes the debtor. ... Progress up the social ladder is made in this way not only for oneself but also for one’s family. Thus in a system of this kind much wealth is continually being consumed and transferred. Such transfers may if desired be called exchange or even commerce or sale; but it is an aristocratic type of commerce characterized by etiquette and generosity; moreover, when it is carried out in a different spirit for immediate gain, it is viewed with the greatest disdain.

Id. at 35–36 (footnote omitted).

10. See Waziyatwin Angela Wilson, Remember This!: Dakota Decolonization and the Eli Taylor Narratives 174 (U. Nebraska Press 2005).

On this topic Ella Deloria wrote: “Giving was glorified. The formal ‘give-away’ was a bonafide Dakota institution. Naturally it followed that things changed hands with readiness when the occasion demanded, since the best teaching said things were less important than people; that pride lay in honoring relatives, rather than in amassing goods for oneself; that a man who failed to participate in the giving customs was a suspicious character, something less than a human being.”

Id. (footnote omitted).


“The result was that, rather than being outright burdens to society, the indigent Sioux actually became necessary vehicles whereby the successful men gained social status.” Id. at 37.


Thus, Comanches responded positively to demonstrations of social behavior like that involved in gift giving. American traders, unfamiliar with the ways of Indians, quickly learned the positive effects of providing their hosts with gifts. In this way persons without any kinship or other social connections to the Comanches could begin to establish such ties through which commerce could be conducted.

Id.


[There were also intertribal contacts utilizing trails and canoe routes over distances of several hundred miles, extending in the case of war parties and diplomatic missions to 1,000 or 1,500 miles. These longer routes formed a network that also had a bearing on life in the individual villages. The entire communication system, composed of local subsystems, hubs, or intermediate terminals, and connections with other networks, can be roughly outlined with the view of demonstrating the wide

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voluntary wealth distribution was the basis for the functioning of tribal government rather than externally imposed demands for pro rata shares of individual tribal member income.

II. INTERACTION OF TRIBAL NATIONS WITH THE UNITED STATES

When the Europeans came to North America, they brought with them their worldviews and laws as developed through centuries of conquest and empire construction and destruction.16 The British realized early on that diplomatic relations were necessary with the larger tribal governments and entered into treaty relations.17 The first interactions between Tribal Nations and the European colonies were intense learning experiences on both sides. The educated among the Europeans greatly admired the tribal political structures and recognized the sovereignty inherent in the Tribal Nations. By adopting the Tribal Nations' concept of incorporating other groups into the central government, Euro-Americans constructed the present federal and state balance called the United States.18 To maintain a physical presence in North America, the leaders within the colonies, and then the United States, acknowledged the need to reach peaceful agreements with Tribal Nations. Hence, the era of treaty making by the United States commenced.

Through these treaties, the United States expanded and asserted its ability to govern the influx of European immigrants and captive Africans under its obligations through treaties with various Tribal Nations. Early on, the federal government, in the Articles of Confederation, and later in the U.S. Constitution, legislated itself as the sole power to enter into relations with Tribal Nations. The reason was simple—if individual states were to enter into commercial relationships and agreements to acquire territory, then the land base of the United States would be threatened and a rival Euro-American government could spring into existence. This has been the motivation of the federal relationship between the Tribal Nations and the United States: The reaching of peaceful agreements to establish and consolidate territorial jurisdiction for the federal government of the United States.19

range of contacts accessible to southeastern Indians.

Id. at 26.


17. See O’Brien, supra n. 3, at 48.


19. It should be noted that the majority of Tribal Nations subscribed to a worldview that included a type of recognition of territorial land ownership. Tribal members respected territories and flexible boundaries for the replenishment of land and the changing localities of tribal sustenance (rotating fields, migrating herds, acknowledged family plots, designated ceremonial grounds per family, etc.). In terms of treaties, the Tribal Nations did not knowingly relinquish all activity on the lands described therein. See e.g. Minn. v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 175–76 (1999) (holding that the Tribes reserved hunting and fishing rights on ceded lands); Wash. v. Wash. Passenger Fishing Vessel, 443 U.S 658, 684–85 (1979) (holding that the Tribes reserved to themselves all fishing in accustomed places for the continued survival of the Tribes); Lac Courte Oreilles Band v. Wis., 775 F. Supp. 321, 322 (W.D. Wis. 1991) (holding that the Tribe reserved hunting
Within the U.S. Constitution, Tribal Nations were mentioned in terms of not being taxed\(^{20}\) and as engaged with Congress in terms of commerce.\(^{21}\) The treaties entered into by the United States were characterized as the “supreme law of the land.”\(^{22}\) Tribal Nations by and large did not engage in ministerial documentation of the treaties entered into with the United States, but recorded their interpretation of the treaties in oral traditions.\(^{23}\) As the United States encroached on Tribal Nations further west of the eastern seaboard, treaty making with the Tribes continued as a process by which to assert the United States’ relationship as primary over other European nations. Once the United States was assured of its dominion against other European nations, the agreements it had entered into with Tribal Nations were no longer regarded as necessary and of primary importance by the federal government.\(^{24}\)

In fact, the United States began seeking military dominance over the Tribal Nations with which it had reached peaceful agreements.\(^{25}\) This shift from peaceful relations to antagonistic military offensiveness can be partially attributed to the assertion of state and settlers’ claims to tribal lands and the subsequent choice of the United States
to wage war on Tribal Nations rather than to contain the state citizens and governments. With the advent of military oppression of Tribal Nations, the legal relationship was skewed in the United States’ tribunals and in the implementation of federal policies towards Tribal Nations. However, Tribal Nations have continued to honor the underlying premise of the treaty-making process by not declaring war against the United States and taking up arms. Tribal Nations throughout the period of outright military offensiveness fought to protect their citizenry, but did not resort to the full-fledged aggression invoked by the United States cavalry and local Euro-American citizen armies. The ensuing holocaust of Indian people has yet to be fully assessed in terms of the numbers massacred and tortured throughout this period.

This tragic period in the history of relations between the Tribal Nations and the United States commencing in the early 1800s only began marginally lessening with the federal policies of the 1970s. From the 1800s to the late 1900s, the United States engaged in experimental social and cultural modification practices on Tribal Nations in an attempt to “kill the Indian, but save the man.” These practices were federalized through the policies of the Bureau of Indian Affairs (BIA). This federal bureau attempted to mandate complete control over tribal life and welfare by its firm grip on the funds designated to Tribal Nations in treaties. The BIA regulated everything from tribal education and tribal government to tribal resources and health care.

From this concept of federal supervision of Tribal Nations, the legal doctrine of the federal fiduciary duty over Indian affairs was adopted. To further enhance this fiduciary duty, the U.S. Supreme Court concluded that Congress had “guardianship power” over the Tribal Nations by incredible extension of the only language in the U.S. Constitution remotely tied to interaction with Tribes, the language on regulating commerce pursuant to Article I, section 8 of the Constitution. This is wholly contrary to the viewpoints of

26. See e.g. Worcester v. Ga., 31 U.S. 515 (1832) (holding that Georgia could not impose its laws upon the Cherokee Nation and dismissed the state’s charges against a missionary within Cherokee lands with consent from the Tribe); Cherokee Nation v. Ga., 30 U.S. 1 (1831) (holding that the Tribal Nation seeking relief from the laws of the state of Georgia was not a “foreign nation” and thus was barred from suit).

27. See O’Brien, supra n. 3, at 272 (detailing the creation of the Bureau of Indian Affairs in 1824 under the Department of War to its transfer in 1849 to the Department of the Interior).

28. See Winona LaDuke, All Our Relations: Native Struggles for Land and Life 1-3 (South End Press 1999).

29. This phrase has been attributed to General Pratt, the Superintendent of the first Indian boarding school, the Carlisle Indian School. See Barbara Landis, Carlisle Indian Industrial School History, http://home.epix.net/~landis/history.html (accessed Mar. 12, 2008).


The BIA Manual consists of 42 Titles and 57 Supplements. In “loose-leaf form it covers one entire book shelf.” It is a “confusing, often contradictory, and generally inefficient compilation of policy and procedure ranging from generally adequate to absolutely unfathomable.” This incredible morass of government regulations often makes it easier for federal administrators to illegally interfere in the internal affairs of Indian nations.


It seems to us that this is within the competency of Congress. These Indians tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found
the Tribal Nations who remain inherently sovereign regardless of the United States' judicial interpretation of its founding document or its adoption of similar legislation.

As the case law and legislation were formulated concerning Tribal Nations, the U.S. government was at liberty to define its relationship through its own tribunals and government halls towards the Tribes. Furthermore, the United States has, under its so-called fiduciary duty, represented tribal interests based on its biased view of the Tribes' best interests, often from an untenable position of conflict with the Tribes.\(^{32}\) Thus, the United States has acted like a colonial power over tribal life, tribal resources, and the tribal individual to the point where tribal people were determined to be incompetent wards to be overseen by the BIA.

Constructing a rationale for total colonial control over Tribal Nations, the U.S. Supreme Court fostered the outright derogation of the treaty agreements between Tribal Nations and the federal government. By holding that tribal members were of a class without full legal rights as incompetent under U.S. laws,\(^{33}\) the U.S. Supreme Court paved the way for the colonial disempowerment of tribal government and the consequent stripping of tribal resources. As sovereign nations, Tribes have been independent of the U.S. Constitution and indirectly impacted by U.S. Indian policy.

With the judicial activism propagating a colonial philosophy over tribal peoples and resources, the express provisions of the U.S. Constitution were disregarded, including the passing reference that Indians were not taxed. Tribal Nations as separate sovereigns native to North America were not part of the formation of the United States and the U.S. founding document, the U.S. Constitution, recognized the separate status of Tribes and individual Indians. With the express adherence of the U.S. Supreme Court and the U.S. Congress to a colonial philosophy of seizing tribal resources by the threat of military domination and the creation of legal fictions as to tribal member competency, a justification for the taxation of tribal resources, land, and individuals was built on this paternalistic assumption of authority over these resources.

Over the last sixty years, the states forming the United States have petitioned the federal government incessantly to override the treaty relationships with the Tribal Nations. To the dishonor of the United States, its federal lawmakers and judiciary have granted in most circumstances those petitions in gross violation of the federal agreements reached with Tribal Nations.

Federal and state taxation was never conferred through treaties. Not only has the U.S. Supreme Court upheld the federal imposition of taxes against Tribes and tribal members,\(^{34}\) but it has found ways to allow states to impose taxes as well.\(^{35}\) The
Supreme Court’s pronouncement of dual taxing authority between Tribes and states glosses over the fact that the federal government has asserted taxing authority as well. Thus, there are potentially three levels of tax for businesses entering reservations. The Tribes as sovereigns must support and maintain tribal government through tribal taxation and have been put in the untenable position of imposing a third level of taxation on tribal members.

When the Tribes acting in their sovereign capacity have asserted their taxing authority within reservation boundaries, the U.S. Supreme Court has found a race-based exception to tribal taxes for non-Indians. This same distinction has not prevented states from asserting retail taxes on tribal members entering into transactions with state regulated businesses. This double standard for Tribal Nations reveals an inherent racial bias by the United States in terms of the original peoples of this continent and that the underlying mentality of colonialism breeds further incursion into the tribal domain.

III. SPECIFIC TAXATION OF TRIBAL NATIONS AND TRIBAL TERRITORY BY THE FEDERAL AND STATE GOVERNMENTS OF THE UNITED STATES

Over time, the tax-exempt status of reservation Indians has been subject to attack through litigation. In response to this litigation, the U.S. Supreme Court has failed to recognize the separate sovereign treaty relationship between the Tribal Nations and the United States and has judicially constructed limitations on the Tribes’ taxing jurisdictions through race-based distinctions. As a result of these court decisions, the Tribes have, through narrow jurisdictional classifications, been subject to the erosion of their taxing jurisdiction. In certain areas, the U.S. Supreme Court has further hindered the economic development of Tribes by judicially authorizing federal and state taxation within the tribal taxing jurisdiction. This process will be followed as it has developed over the last century within the United States to the present.

A. Taxation of the Tribal Land Base

Taxation of property has been the foundation of European practices of collecting revenue to operate governments. Once Europeans crossed the Atlantic, tribal lands were actively sought after for homesteading and acquisition by state governments before the concern over taxation began. When the United States imposed military control over the Tribal Nations, the traditional homelands of many Tribes were settled by Euro-Americans while the Tribal Nations were relocated on lands “set apart” for their use. These lands set apart were termed reservations, Indian communities, tribal corporations, rancherias, or Executive Order trust lands depending on the U.S. representatives encountered and which part of the continent the Tribal Nation met with these representatives. These lands now fall under the general heading “Indian country.” Because of the sovereignty of Tribes, these lands were exempt from all forms of taxation.


37. See Cohen, supra n. 24, at 45–54 (describing removal treaties and legislation in the 1800s).

38. See id. at 188 (citing 18 U.S.C. § 1151 (2000), which legally defines Indian country).
and under federal restriction from sale with the occupancy of Tribal Nations. This policy was unilaterally and sharply changed in 1887 with the passage of the Dawes Act (popularly known as the "General Allotment Act").

Under the Dawes Act, the federal policy focused on breaking up the tribal land base from community property and territories to individual allotments as a means to assimilate tribal members to the lifestyle of Euro-American farmers. Specifically, the Allotment Act provided for 160 acres to be apportioned to each head of household and any other lands after this apportionment within the control of the Tribes was regarded as "surplus" which the federal government sold to homesteaders. Additionally, the Allotment Act held that the individual allotments were in a federal trust status for twenty-five years preventing the sale of the lands. The stated purpose for the trust period was to familiarize tribal members with the European concept of land ownership. The subsequent amendments by the Burke Act of 1906 allowed for allottees to be declared "competent" by area BIA officials for the alienation of lands formerly held in trust status.

A second wave of dispossession occurred as a result of the 1906 Burke Act passed by Congress providing for competency hearings to determine an Indian fit for the purpose of selling lands to an interested buyer. From 1887 to 1934, the loss of lands from tribal membership to non-Indian ownership represented two-thirds of all allotments and near twenty-seven million acres.

Throughout this period, tribal members were largely without adequate resources to provide for their families and any means by which to gain resources were utilized leading to the selling of the land allotments. From the start, the General Allotment Act was doomed for failure as a means to provide individual landholdings for tribal members, but was a ravishing success in providing quick access to the reserved landholdings of Tribal Nations by homesteaders and other Euro-Americans regardless of treaty language reserving these same lands to the Tribes. One of the logical consequences of dispossessing Tribal Nations of their landholdings and deeding specific


Despite the devastating effects of fee patents, the 27 million patented acres lost to non-Indians represented only about one-third of the tribal losses during the allotment era. More than twice as much land—some 60 million acres—was lost under the surplus lands program. The General Allotment Act provided that once reservation lands were allotted in severalty, the remaining "surplus" lands could, at the discretion of the President, be opened to non-Indian settlement.

Id. (footnotes omitted).
42. See Cohen, supra n. 24, at 1042.
43. Id.
44. Id. As one commentator observed:

Between 1887 and 1934, the tribal lands of 118 reservations were allotted, although many reservations, particularly in the Southwest, escaped allotment. From 1887 to 1900, the federal government approved 53,168 allotments, totaling nearly five million acres, and almost 36 million acres had been allotted by 1920. By 1934, approximately 27 million acres, or two-thirds of all the land allotted to tribal members, had passed by sale or involuntary transfer from the Indian fee owner into non-Indian land ownership.

Id. (footnotes omitted).
small tracts to individual tribal members was the devastation of tribal economies and the
destruction of access to areas of abundant food and other resources. Thus, the General
Allotment Act commenced generational impoverishment of tribal members wherever
lands were allotted and consequently, tribal economies destroyed.\footnote{See Leeds, supra n. 41, at 832.}

The policy of allotment that began in 1887 was halted with the passage of the
Indian Reorganization Act (IRA) of 1934.\footnote{25 U.S.C. §§ 461-79.} Heralded in was the next federal policy of
preserving a vestige of tribal cultural autonomy replacing the former policy of total
assimilation into Euro-American society. The IRA set in motion the reorganization of
tribal governments modeled after a BIA standardized constitutional form.\footnote{See Deloria & Lytle, supra n. 4, at 141-43.} To ensure
that tribal members were bound by these constitutional forms, the BIA officials
instigated tribal votes where tribal members were required to vote against adoption of the
constitutional structure to prevent adoption as the official form of tribal government.
This negative vote process clearly cuts against the democratic form of government
claimed by the United States. In dealing with Tribal Nations, the U.S. has resorted to
any means necessary tactics to pursue its agenda of total colonial domination.

The acceptance of these types of BIA-recognized tribal governments resulted in
the receipt of federal monies based on social welfare programs. Several Tribal Nations
refused to succumb to federal pressure to adopt these boilerplate constitutional models,
but eventually did accept a distant relative of the constitutional form. Unfortunately, the
BIA-mandated tribal government models lacked the checks and balances system
celebrated as the saving grace for the United States in its three branches of government.
Rather, the BIA boilerplates concentrated the legislative, executive, and judicial
functions all in one body, which over time would be a source of on-going contention
(Carolina Academic Press 2005).} The passage of the IRA signaled a halt before the complete
dispossession of tribal peoples to their land, however, the havoc wreaked by the
Allotment Act proved a longstanding legacy that Tribes still contend with at present.

Tribal Nations must deal with complex jurisdictional issues due to the
consequences of the Allotment Act as well as specific congressional legislation imposing
regulation on the tribal land base. The imposition of the United States into the sovereign
domain of the Tribal Nations must be the beginning point for evaluating all such
jurisdictional issues. Prior to the creation of the United States, the sovereignty and
jurisdiction of separate Tribal Nations was of no great concern and was accepted without
argument.

Since the founding of the United States, new U.S. laws and regulations have been
developed which purport to control tribal territory. These federal directives evolved
without tribal knowledge or input and therefore, lack legitimacy from the tribal
viewpoint as external assertion of colonial control. In addition, these encroachments
appear after the majority of the tribal land base had been appropriated by the United
States to itself in direct contravention of the sovereign status of Tribal Nations and the
fiduciary duty claimed by the federal government over Tribal Nations.

Tribal lands have become a source of complexity on jurisdictional grounds. The original understanding of the Tribal Nations remains the same—that tribal lands are exempt from state and federal taxation based on inherent tribal sovereignty. Three cases, popularly referred to as The Kansas Indian cases,\textsuperscript{49} were certified to the U.S. Supreme Court in 1866 based on the attempt of the state of Kansas to tax the lands of the Shawnee,\textsuperscript{50} the Wea,\textsuperscript{51} and the Miamis.\textsuperscript{52} The question presented was whether the tribal lands that were held in severalty, as opposed to those that were held in common, were subject to state taxation.\textsuperscript{53} The Court held that pursuant to treaties with the Kansas Indians, the tribal lands were not subject to taxation and that Kansas entered the Union under the agreement to respect the title of the Indians under federal protection.\textsuperscript{54}

Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization. As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of the State laws.\textsuperscript{55}

Ten days later, the U.S. Supreme Court addressed the state taxation issue as it pertained to the Seneca Nation and the state of New York. The case popularly known as the New York Indians upheld the tax-exempt status of the reservations at issue there.\textsuperscript{56}

The question of the taxation of Indian lands, while in their tribal organizations, by the State authorities, has been before us this term in several cases from the State of Kansas, and after a very full consideration of the subject the power was denied.\textsuperscript{57}

This recognition of the Tribal Nations’ sovereign status by the United States judiciary was to change over time. After the allotment era, the status of reservation lands was more vulnerable to state and local efforts at taxation. However, it has not been until the late 1980s and the 1990s that the impact of the emboldened state and local efforts has gained a solid foothold in the U.S. federal courts.

In a 1992 groundbreaking case, the U.S. Supreme Court changed the status of Indian fee-patented reservation land on the basis of the former allotment policy. In County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation,\textsuperscript{58} the county sought to impose two taxes on fee-patented reservation land.\textsuperscript{59} The first was an ad valorem tax and the second was an excise tax in the event of sale of the reservation land.\textsuperscript{60} The Court held that the reservation land had been allotted under the General

\textsuperscript{49} 72 U.S. 737 (1866).
\textsuperscript{50} Id. at 751–57 (reporting of Blue Jacket v. The Bd. of Commrs. of the Co. of Johnson).
\textsuperscript{51} Id. at 757–59 (reporting of Yellow Beaver v. The Bd. of Commrs. of the Co. of Miami).
\textsuperscript{52} Id. at 759–61 (reporting of Wanzopeah v. The Bd. of Commrs. of the Co. of Miami).
\textsuperscript{53} Id. at 737.
\textsuperscript{54} The Kan. Indians, 72 U.S. at 757.
\textsuperscript{55} Id.
\textsuperscript{56} In re N.Y. Indians, 72 U.S. 761 (1866).
\textsuperscript{57} Id. at 769.
\textsuperscript{58} 502 U.S. 251 (1992).
\textsuperscript{59} Id. at 253.
Allotment Act and was therefore subject to § 5 of the Act which stated that upon expiration of the trust period, the land would be “discharged of said trust and free of all charge or incumbrance [sic] whatsoever ...”61 This was interpreted by the Court as coupled with the Burke Act proviso allowing for competency determinations to remove land from trust status and then subjecting the fee-patented reservation land “to assessment and forced sale for taxes.”62

The U.S. Supreme Court soundly rejected the assertion by the Yakima Nation that the subsequent policies of the IRA of 1934 reversed the policies of the Allotment Act and returned the status of the land to its original exempt status.63 Therefore, the Court concluded that the fee-patented land was subject to the county’s ad valorem tax64 and forced sale if the taxes went unpaid. In essence, the Court failed to recognize the aboriginal status of the land as not taxed based on tribal ownership and sought to reassign the land after the federal trust restriction expired to state jurisdiction status.

As for the excise tax on the sale of fee-patented reservation land, the Court found that the Burke Act proviso only addressed taxation of land and not the sale of land.65 The excise tax was void because it constituted a direct tax “upon the Indian’s activity of selling the land.”66

The few remaining lands that the Tribal Nations still have which have been fee-patented may now be subject to local ad valorem taxes as a result of the Yakima opinion and can be lost in forced sales to collect those county taxes.67 This has left the Tribes in a vulnerable position since they must not only provide services to tribal members, but the land base upon which they maintain the tribal government may be subject to local taxation if the land was part of the allotment process prior to 1936 and is not currently in trust status with the U.S. federal government. This forces the Tribes to maintain the tribal land base by applying to the Department of the Interior for each fee-patented parcel to be placed into trust status under federal restriction. The aboriginal inherent characteristics of land owned by a Tribe has been disregarded as the United States has imposed the further requirement that the land be placed into trust status with the U.S. federal government to be exempt from federal and state taxation—a paradox in terms of maintaining the tribal sovereign status of land as tribally owned and tax exempt in regards to the subordinate governments of the U.S. through a federal trust process.68

61. Id. at 263 n. 3 (citing 25 U.S.C. § 348).
62. Id. at 264.
63. Yakima, 502 U.S. at 264.
64. Id. at 270.
65. Id. at 269.
66. Id.
67. See L. Scott Gould, The Consent Paradigm: Tribal Sovereignty at the Millenium, 96 Colum. L. Rev. 809, 888 (1996) (“As a result of Yakima County, Washington could not only tax and foreclose upon fee land owned by members of a tribe, but also land owned by the tribal government itself... With scarcely a nod toward the Indian Reorganization Act and congressional intent, Yakima County resurrected a devastating ramification of the Dawes Act: once again, states had a means to appropriate tribal lands.”).

Why not give us back our land? Title to trust land should be returned to tribes and individuals in fee under a new tribal status. This new tribal status must confer permanent jurisdiction, complete with full taxation powers to the tribe, ensuring that the land will always be subject to tribal jurisdiction...
Furthermore, the ability of Tribes to place land into trust status has been under serious attack recently in Congress and through the BIA revised regulations. Various proposals have circulated in the several sessions in the late 1990s and early 2000s to force Tribes to agree to state taxation compacts on other tribal revenue sources prior to qualifying for federal approval to put reservation fee lands back into trust status.\(^69\) State and local governments must be contacted by Tribal Nations for off-reservation fee land applications for trust status, which allows this type of strong-armed negotiation against the tribal interests.\(^70\)

**B. Taxation of Oil and Gas Production within Indian Country**

The earliest means of deriving income from the lands upon which Tribal Nations were relegated to was from leasing the land itself. In many instances, the federal government sought to locate the Tribal Nations on land that was not attractive to homesteaders where possible. Ironically, this resulted in many Tribal Nations having rights to land that was later found to contain oil, gas, and other mineral deposits valued by the Euro-Americans. The first real push to tax Indian lands was from the recognition of oil and gas underlying tribal lands.\(^71\) As early as 1891, Congress authorized the Secretary of the Interior to oversee the leasing of tribal lands for grazing and mining, thus acting in accordance with the colonial approach to depleting native lands and their resources.\(^72\) In 1924, Congress enacted further legislation that divided the profits from unallotted reservation lands' oil and gas production with the surrounding states.\(^73\) This initial intrusion into the unallotted lands of Tribal Nations in terms of income and taxation sets the stage for the subsequent encroachments by state and local governments into the Tribes' economic foundations.

The 1924 Act provided expressly for state taxation of oil and gas produced from Indian lands.\(^74\) The basis of this authority to tax is not stated nor was a legal challenge considered for almost sixty years. The Act provided the states with the ability to tax the oil and gas production:

\begin{quote}
*Provided, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: Provided, however, That*
\end{quote}

regardless of the race of the landowner. In one move, we can liberate Indian country economically and politically.


\(^{70}\) See 25 C.F.R. § 151.11 (2007).

\(^{71}\) For a comprehensive examination of the fraudulent means employed to control oil and gas revenues at the expense of Tribal Nations, see Angie Debo, *And Still the Waters Run: The Betrayal of the Five Civilized Tribes* (Princeton U. Press 1972) (illustrating the history of the state of Oklahoma and its dispossession and treatment of the Tribal Nations living in the area).

\(^{72}\) 25 U.S.C. § 397 (providing that upon authorization by a council speaking on behalf of Indians, leases of five years could be entered into for grazing purposes and ten years for mining purposes).

\(^{73}\) Id. at § 398.

\(^{74}\) Id.
such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner. 75

After the U.S. Attorney General in 1922 opined that Executive Order Reservations were not subject to the leasing provisions of other federal lands, Congress amended the 1924 Act in 1927 to provide for oil and gas leases on Executive Order Reservations. 76 This state of affairs occurred based on the federal approach to tribal lands as an exploitable resource, although the federal government asserted its fiduciary obligation to Tribal Nations as the justification for such exploitation.

In 1938, Congress enacted the Indian Mineral Leasing Act 77 with the stated purposes of: 1) providing uniformity in the leasing of Indian lands, 2) harmonizing the leasing of such lands with the IRA of 1934, and 3) providing that the Indian owners receive the greatest return on the income derived from their property. 78 However, the 1938 Act did nothing to upset the state taxation of oil and gas production on reservation land where the Act expressly provided that the Tribal Nations receive only royalty income.

The first major challenge to the oil and gas taxation scheme on reservation lands did not occur until the 1980s as the Tribal Nations became versed in oil and gas law and the accumulated wrongs that were enacted as legislation by the United States Congress. Ironically, one of the first challenges to taxation for on-reservation oil and gas production was aimed squarely at tribal taxation, and oil companies brought the challenge. In Merrion v. Jicarilla Apache Tribe, 79 oil corporations challenged the right of the Tribal Nation to impose a severance tax on oil and gas production on Executive Order Reservation land. 80

The U.S. Supreme Court, in an exhaustive opinion, concluded that the Tribal Nation had the inherent authority to impose taxes on the production from its own lands, that state taxation did not preempt tribal taxation, and that the taxation by the Tribe did not violate the Commerce Clause. 81 In a footnote, the Court stated that it was not reaching the issue of whether the states had taxing authority over on-reservation oil and gas production under a lease issued pursuant to the 1938 Act. 82

Consequently, the Tribal Nations were recognized as having the taxing authority, for at a minimum, on the same production that the states had been allowed to tax. Thus, the decision placed oil and gas production on reservation lands subject to both tribal and state severance taxation. In essence, Merrion illustrated that the U.S. colonizing power could not find a justification to totally supersede the tribal taxing authority, but still

75. Id. (emphasis added).
76. The 1924 Act was amended to provide that the Tribal Nations on Executive Order Reservations would receive royalties which would be placed into accounts with the Secretary of the Interior for the benefit of the Tribes and for the costs associated with oil and gas operations on reservation lands. Id. at § 398b.
77. 25 U.S.C. §§ 396a-396g.
79. 455 U.S. 130 (1982).
80. Id. at 133.
81. Id. at 159.
82. Id. at 151 n.17.
found a way to uphold state taxation on the tribal resources. The further question of whether state taxation itself was applicable to revenue generated from reservation land oil and gas production was not addressed for another seven years.

In Montana v. Blackfeet Tribe of Indians, the Blackfeet Tribal Nation successfully challenged the state taxation of tribal royalty income. The state of Montana argued that the oil and gas lease at issue executed pursuant to the 1938 Act was within the taxing provisions of the 1924 Act and that the subsequent 1938 Act should not be construed so as to repeal the state taxing provisions of the former Act. The U.S. Supreme Court, relying on specific canons of construction, held that without “clear congressional consent to taxation, . . . the State may not tax Indian royalty income from leases issued pursuant to the 1938 Act.” The Blackfeet Tribal Nation’s case was decided in 1985, therefore, based on the case’s reasoning, state taxation on tribal royalty income had been illegally allowed from 1938 until 1985, for forty-seven years while the Tribal Nations were said to be within a fiduciary relationship with the United States.

The strong dissent in the Montana case foreshadowed the second case concerning the oil and gas leases of the Jicarilla Apache. Justice Stevens’ dissent in Merrion maintained that the tribal power to tax rested solely on the tribal power to exclude and did not encompass renegotiation of oil and gas leases. The dissent asserted that once the Tribe had allowed the non-Indian lessee on tribal land, there could be no further conditions of that entry, such as subsequent taxation. Furthermore, the dissent found it relevant that at the time of the leases the Tribal Nation did not have a tax code and should not assert its right to tax the prior lessee once a tax code was developed.

In the 1989 Cotton Petroleum Corporation v. New Mexico case, an oil company challenged the state’s taxation of oil and gas production on the Jicarilla Apache Reservation. The U.S. Supreme Court, with Justice Stevens writing for the majority, upheld the state’s taxation as permitted by the 1938 Act and that as an Executive Order reservation, the Jicarilla Apache lands had historically been subject to state taxation for oil and gas production. The majority stated in a footnote that the Montana decision was not to the contrary and stood for the narrow proposition that states could not directly tax Tribes. Rather, the Court stated that both the state and the Tribal Nation share concurrent jurisdiction through the federal scheme. To further substantiate its holding, the majority relied on three other factors: 1) the state provides services to the lessees and

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84. Id. at 768.
85. Id. at 765.
86. Id. at 768.
87. Id.
89. Id. at 186.
90. Id.
91. Id. at 188.
93. Id. at 166.
94. Id. at 182.
95. Id. at 183 n. 14.
96. Id. at 189.
the tribal members, there need be no equality between taxes paid and services provided, and the Tribal Nation had not shown its ability to attract oil and gas leases had diminished because of the state tax.

With the holding in Cotton Petroleum, the U.S. Supreme Court sanctioned the breach of fiduciary duty by the federal government in permitting state taxation on tribal lands at the outset. In addition, the Court sanctioned the further injustice that income derived from tribal lands would be burdened by state taxation in addition to tribal taxation on the same source of production.

C. Taxation of Tribal Economic Development Enterprises

Aside from oil and gas production, the Tribal Nations have followed other routes in generating revenue to provide for tribal government and member services. In these efforts, states have levied taxes on the Tribal Nations resulting in frequent litigation to defend the status of tribal enterprises and income. As the case law has developed, the U.S. Supreme Court has become increasingly deferential to state revenue generating justifications and antagonistic to tribal interests.

In Mescalero Apache Tribe v. Jones, the state of New Mexico sought to impose two taxes on a tribal ski resort: A state sales tax for services or tangibles sold at the resort and a compensating use tax on materials bought out of state to construct two ski lifts. The first issue before the Court was the status of the land upon which the ski resort was built. The Tribal Nation, following the IRA’s tribal corporation powers, leased the land from the U.S. Forest Service with a loan pursuant to the IRA. The land hosting the ski area bordered on the Tribe’s reservation, but was outside of the reservation

98. Id. at 190.
99. Id. at 191.

Tribal economies clearly can be damaged by state taxation of non-Indian businesses that help develop tribal resources. For this reason, the Supreme Court has been unwilling to allow state taxation to encompass the reservations. The decision in Cotton Petroleum Corp. v. New Mexico reverses this general trend, making state taxation of non-Indian developers on the reservation the norm, and the protection of tribal economies the exception.


The economic justification identified to allow tribal taxation of reservation natural resources do not exist for state taxation. State taxes create barriers to tribal natural resources development. They discourage private developers from entering into agreements with tribes and reduce the revenue available to tribes through taxes of their own. The taxes siphon off natural resources rents to which states have no moral or equitable claim—states neither own the extracted resource nor provide substantial benefits to the taxed party. Most importantly, of course, state taxation thwarts Congress’s interest in protecting tribes and encouraging their economic and political independence.

103. Id. at 146–47.
104. Id. at 147–55.
105. Id. at 146, 158 n.13.
The rule announced by the Court was: "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." The Court rejected the claim that tribal economic development engaged in pursuant to the IRA rendered that activity a federal instrumentality exempt from state taxation. Rather, the Court noted that the purpose of the IRA was to "disentangle the tribes from the official bureaucracy." Considering whether tribal income was taxable by the state, the Court relied on prior decisions where the state and federal government were permitted to tax a tribal member's share of income from tribal mineral resources and where federal taxation on a tribal member's royalty income from oil lands was allowed. Based upon this reasoning, the Court upheld the New Mexico gross receipts tax on the income earned from the tribal ski resort as an off-reservation enterprise.

The second New Mexico tax, the compensating use tax, was aimed at the personal property permanently attached to the leased property for the tribal ski resort. Finding that the property improvements "on the Tribe's tax-exempt land would certainly be immune" from state taxation, the Court concluded that the state compensating use tax was inappropriate as well for the permanent property improvements.

Therefore, in Mescalero, the U.S. Supreme Court did not attribute the status of the Tribal Nation to the income of its economic enterprise and chose instead to rely on an analogy to an individual Indian person going off-reservation as subject to state jurisdiction. This decision signaled to all of Indian Country that Tribal Nations were to be strictly limited to whatever parcels of land were retained after the previous allotment era in terms of tax exemptions for business enterprises.

For Tribal Nations seeking to harvest timber as an income source, litigation arose over the transporting of the logs to be sold. In White Mountain Apache Tribe v. Bracker, the state of Arizona attempted to impose two taxes (motor carrier license and use fuel taxes) on a non-Indian logging company which operated exclusively on reservation land and roads. The Court set out a new test in this case to determine whether state taxation was valid. The first prong called for an examination into federal law to determine whether the state tax was preempted on that ground. The second relied on an inquiry into the "right of reservation Indians to make their own laws and be ruled by them."
To properly apply these prongs to the situation at hand, the Court defined its analysis in the following terms:

[W]here, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.119

This particularized inquiry of interests demonstrated in the present case that federal regulation over the tribal timber industry was extensive, comprehensive, and based on decades of administration.120 Therefore, the Court concluded that federal law preempted the state’s taxation for this tribal activity.121 The Court remarked that an additional consideration in their determination had been the failure of the state “to identify any regulatory function or service performed by the State that would justify the assessment of taxes for activities on Bureau and tribal roads within the reservation.”122

While the Bracker case appeared a victory for Indian Country over the imposition of state taxation, the Court in effect had placed a balancing of interests test into the tax-exempt status of the Tribal Nations’ income.123 Because the test so heavily relies on historical circumstances, it can only disfavor the Tribes as they seek to expand and diversify their business enterprises.124 The weighing of interests attributed to Tribal Nations providing governmental and social services to tribal members should far outweigh any justifications by the states in terms of imposing a similar tax on tribal lands and activities. Ironically, one of the greatest determinative weights to preempt state taxation is the presence of federal regulation over the tribal enterprise. Therefore, Tribes in the final analysis either submit to federal regulation with consequent taxation or to

119. White Mountain, 448 U.S. at 144–45.
120. Id. at 148.
121. Id.
122. Id. at 148–49.
123. See Alex Tallchief Skibine, Reconciling Federal and State Power inside Indian Reservations with the Right of Tribal Self-Government and the Process of Self-Determination, 1995 Utah L. Rev. 1105, 1155 (“The balancing aspect of the preemption doctrine, like the congressional plenary power doctrine, cannot be legally justified. Determining what constitutes interference with tribal self-government should not be left to an act of judicial balancing. Instead, any exercise of state jurisdiction in Indian country, should be construed as an interference with tribal self-government.”).
both federal and state imposition of regulation and taxation as adjudged in the U.S.
federal courts. In other words, there is no pure tribal preemption of either federal or state
regulation combined with taxation according to United States judicial determination.

D. Taxation in the Form of Payments through Tribal-State Gaming Compacts under
the Indian Gaming Regulatory Act

In 1988, the Indian Gaming Regulatory Act (IGRA) became federal law and
purported to regulate the gaming operations in Indian Country under Tribal Nation
control. This novel piece of legislation both assumed federal jurisdiction over the
regulation of Indian gaming and then in a totally unprecedented fashion, asserted that the
Tribal Nations engage in agreements with state governments to operate gaming
enterprises or violate federal law. This delegation of federal treaty-making authority to
the political subdivisions of state governments has signaled a severe intrusion into the
Tribal Nations’ relationship with the United States.

The current posture of this state compacting requirement for Tribal Nations has
resulted in litigation upholding state sovereign immunity from suit where Tribal Nations
have activated the IGRA to enforce the state’s good faith responsibility to negotiate,
as well as putting Tribal Nations in jeopardy of severe monetary fines and criminal
charges for operating gaming enterprises without state agreements. Rather than risk
costly litigation defending the Tribal Nation’s right to operate its own business on tribal
lands, for the most part, Tribes have entered into state compacting agreements.

The state governments, free from any type of legal consequences for refusing to
negotiate with the Tribes, have been in a position to extract fees on a net percentage basis
for the approval of gaming compacts. This type of extortion has the sanction of
federal law through the IGRA. Thus, the IGRA has authorized a type of state taxation on
the tribal gaming enterprises by forcing the Tribes to enter into compacts with states.

In addition, the IGRA authorizes federal taxation on any disbursement from a
Tribal Nation’s gaming proceeds to a tribal member. The U.S. Congress has also
authorized state taxation for the purposes of unemployment benefits for those employed
by the Tribe itself, each tribal subdivision, tribal subsidiary, or any wholly owned tribal
business enterprise, including gaming enterprises. Thus, under the IGRA, federal and
state taxation have gained a new foothold in tribal economic enterprises. This is the

(challenging the IGRA on four grounds: The act violated tribal self-determination guaranteed in the treaties
with the U.S. government; “Congress violated its federal trust responsibility” in passing the act; the act
unconstitutionally restricts federal courts from their constitutional function of resolving cases or controversies;
and the act interfered with tribal “self-government in violation of the Fifth Amendment”).
129. See generally Rubin Ranat, Student Author, Tribal-State Compacts: Legitimate or Illegal Taxation of
130. Extortion is defined as “the obtaining of property from another induced by wrongful use of actual or
threatened force, violence, or fear, or under color of official right.” Black’s Law Dictionary at 405.
132. 26 U.S.C. § 3309(d)
most contemporary expression of the colonizing philosophy as the entrance of Tribal Nations into the gaming industry has occurred only over the last few decades.

E. Transaction Taxation Based on Indian/Non-Indian Status

Because of the exhaustible nature of the resources available to the Tribal Nations from mining, timber, and other land intensive industry, the Tribal Nations have sought other types of retail activities to sustain tribal economies. Many Tribal Nations were able to generate revenue through convenience stores and the licensing of trading posts or smoke shops. These activities have been conducted within Indian Country. Beginning in the 1970s, state attempts to impose taxation on cigarette sales within Indian country would prove to be a litigious issue for the Tribal Nations.

1. State Imposition of Cigarette Sales Taxes in Indian Country: Based on Race of Purchaser

In Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, the state of Montana attempted to impose several taxes on retail income for the Tribes: A license fee on retail on-reservation vendors, a sales tax on cigarette sales by Indians to Indians on the reservation, and a sales tax on cigarette sales to non-Indians on the reservation. The U.S. Supreme Court first addressed the issue whether the Tribal Nations were barred from bringing an injunctive action in federal court against the state imposition of taxes on reservation lands. The Court found that 28 U.S.C. § 1362 was intended by Congress to give Tribes access to federal courts in suits that may have been brought on their behalf by the United States as trustee, but had not been brought for whatever reason. Therefore, the Tribes’ injunctive action was properly before the Court.

The state also advanced the argument that, by virtue of the tax-exempt status of reservation Indians, the federal government had forced upon Montana a racially-based exemption that was violative of the Fourteenth Amendment’s equal protection guarantee and the Fifth Amendment’s due process clause. The Court rearticulated the long-settled principle that Indian Tribes are specially treated populations based on the historical relationship with the federal government.

The Court then summarily rendered the state taxes on cigarette sales to Indians and the vendors’ licensing as void and contrary to federal law. However, the Court upheld the state tax on cigarette sales to non-Indians in Indian Country. The sales tax was viewed by the Court as a “minimal burden designed to avoid the likelihood that in

134. Id. at 467–68. The state also imposed a property tax on motor vehicles belonging to tribal members on the reservation. Id. at 468–69. This part of the case will be included in the separate examination of “Taxation of Tribal Member Property and Income.”
135. Id. at 470–75.
136. Id. at 472–73.
137. Moe, 425 U.S. at 479.
139. Id. at 480–81.
its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax.”

With the finding that non-Indian purchasers of goods on reservations are subject to state sales tax, the U.S. Supreme Court ultimately undermined the Tribal Nations’ efforts at revenue generating enterprises located on tribal lands. This line of cigarette taxation cases also illustrates the U.S. Supreme Court’s imposition of racial discrimination in the area of taxation within tribal jurisdictions. Tribes are put in the unwelcome position of asserting taxes on a race-based analysis—who is Indian and who is not—in order to determine which tax may apply.

By legalizing state taxes on retail sales to non-Indians within Indian country, the Court has effectively claimed full dominion over tribal lands and economic activity in the vein of colonization. Tribal territorial sovereignty is subsumed by this decision in which the race of the purchaser within the tribal community determines whether state taxation is applicable. Furthermore, as in the previous sanctioning of state taxation on tribal resources, the economic viability of tribal transactions is diminished with the imposition of state taxation on top of the inherent authority of Tribal Nations to impose tribal taxation within tribal lands.

The next case in this series is \textit{Washington v. Confederated Tribes of the Colville Indian Reservation}. The state of Washington imposed a cigarette sales tax by requiring cigarette wholesalers to affix stamps on cigarettes intended for non-Indian purchasers on reservation lands. The state had seized unstamped cigarettes destined for the reservation as contraband based upon its view that the cigarettes were to be sold to non-Indian purchasers. The Court characterized the tax-exempt status of goods sold on the reservation by tribal businesses or subject to tribal taxes alone as an unfair trade mechanism.

If [the Tribe’s] assertion were accepted, the Tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing custom from surrounding areas. We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.

\begin{flushright}
141. \textit{Id.}
143. \textit{Id.} at 141–42. The state also imposed a personal property tax on Indians living on the reservation. \textit{Id.} at 142. This part of the case will be included in the separate examination of “Taxation of Tribal Member Property and Income.”
144. \textit{Id.}
147. \textit{Id.} (footnote omitted).
\end{flushright}

\textit{Washington v. Confederated Tribes of the Colville Indian Reservation} upheld the inherent right of tribes to tax non-Indians for reservation sales, and \textit{Merrion v. Jicarilla Apache Tribe} upheld the power of a tribe to impose severance taxes on non-Indian leases. But even these few victories were not untrammeled. Non-Indians could challenge the civil jurisdiction of tribes in federal proceedings, and states could disrupt tribal economies by taxing transactions on reservation which involved non-Indians.

\textit{Id.} (footnote omitted).
Claiming that the Tribes were trying to take an unfair advantage of their status as sovereigns, the Court failed to acknowledge that the Tribes have the inherent authority to regulate the sale of goods on tribal lands with consequent tribal taxation regardless of the race or nationality of the purchaser. The Court returned to the language of the oil and gas leasing cases to pronounce "[t]here is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other."148 What the Court failed to mention was that this kind of super-taxation would oust prospective businesses from the reservation.

In Colville, the revenue generated by the Tribal Nations on reservation land through the sale of goods received the same fate as the oil and gas production, in that the revenue was subject to double taxation, tribal and state, on the very same product.

In Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe,149 the State argued that the Tribe resided on trust land, which should receive different treatment than reservation land in regards to state taxing of cigarette sales.150 The Court held that the state was entitled to the sales tax for non-Indian purchases of cigarettes within Indian Country, but was not entitled to sales tax on Indian purchases.151 Another contention brought by the State was that it be permitted to seek a direct judgment in federal court against the Tribe for remittance of past sales tax collection regardless of tribal sovereign immunity.152 The Court refused to reconsider the well-established principle of tribal sovereign immunity in the case and offered the State several alternatives in collecting the taxes: 1) bring suit against tribal officials, 2) seizure of unstamped cigarettes off-reservation, or 3) enter into an agreement with the Tribe for collection of taxes.153

The final statement on the collection of state taxes on cigarettes for non-Indian purchasers within Indian Country was provided in Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.154 There the U.S. Supreme Court considered the New York regulations that had been imposed upon retailers in Indian Country for the sales of cigarettes.155 The state regulatory scheme required first a "probable demand" figure for sales on reservation to Indians and limited the number of tax-exempt cigarette sales to that number.156 The scheme required cigarette vendors on reservations to document tribal member status by show of tribal member identification for each sale of cigarettes and to give monthly reports to the state tax commission.157 Finally, the scheme imposed no restrictions on the sales of state taxed cigarettes.158

The Court relied on its prior decisions in Moe, Colville, and Potawatomi in finding

148. Id. at 158.
150. Id. at 511.
151. Id. at 512 (citing Colville, 447 U.S. 134; see also Moe, 425 U.S. 463).
152. Id. at 514.
153. Id. (citing Colville, 447 U.S. 134; Ex Parte Young, 209 U.S. 123 (1908); City Vending of Muskogee, Inc. v. Okla. Tax Commn., 898 F.2d 122 (10th Cir. 1990)).
155. Id. at 64.
156. Id. at 65–66.
157. Id. at 67.
that "[s]tates have a valid interest in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-exempt cigarettes on reservations; that interest outweighs tribes' modest interest in offering a tax exemption to customers who would ordinarily shop elsewhere." 159 With the Milhelm Attea decision, the U.S. Supreme Court upheld the treatment of tribal members as second-class citizens within their own lands by requiring documentation at every sale of cigarettes to a tribal member. 160

2. Motor Fuels Excise Tax in Indian Country

In a 1995 decision, the U.S. Supreme Court struck down the Oklahoma imposition of a motor-fuels tax on the Chickasaw Nation's convenience store. In Oklahoma Tax Commission v. Chickasaw Nation, 161 the Court set out a standard categorical approach when the state seeks to tax the Tribe or tribal members within Indian Country. 162 The rule that the Court articulated was that "[i]f 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." 163 The Court easily concluded that the legal incidence of the motor-fuels tax fell on the Tribal Nation and thus, voided the state tax. 164 The Court found its extensive balancing tests as set out in Bracker 165 would apply for a tax where the legal incidence fell on non-Indians. 166 However, the Court did instruct Oklahoma that by rewriting its taxing statute so as to place the legal incident on someone other than the tribal retailer, the result may be different. 167

Apparently, the state of Kansas heeded the U.S. Supreme Court's advice when the state sought to tax the non-Indian distributor of motor fuels to the Prairie Band Potawatomi Nation's casino gas station. In Wagnon v. Prairie Band Potawatomi Nation, 168 the U.S. Supreme Court distinguished the Chickasaw decision at the outset, finding that "Kansas law makes clear that it is the distributor, rather than the retailer, that

159. Melhelm Attea, 512 U.S. at 73.

The Court invoked no principle for its extension of state jurisdiction over reservation Indians in Milhelm. It simply stated that the "balance of state, federal, and tribal interests' in this area thus leaves more room for state regulation than in others." The decision effectively sanctioned state regulation of commerce with Indian tribes, a matter historically and constitutionally reserved to Congress.

Id. (footnotes omitted).
161. 515 U.S. 450 (1995). The state also imposed an income tax on tribal members. Id. at 453. This part of the case will be included in a separate examination of "Taxation of Tribal Member Income within Indian Country."
162. Id. at 458–59.
163. Id. at 459.
164. Id. at 461–62; see Getches, supra n. 160, at 1630. Getches notes that "[i]n Oklahoma Tax Commission v. Chickasaw Nation, the Court characterized its approach to state regulation of Indian activities in Indian country as 'balancing interests.' Never before had the Court allowed consideration of state interests—and certainly not a balancing of interests—in a case involving Indian activity on the reservation." Id.
165. 448 U.S. at 142–45.
166. Chickasaw Nation, 515 U.S. at 459.
167. Id. at 461.
is liable to pay the motor fuel tax." The Court also disregarded its earlier statement as to the applicability of the Bracker test by reasoning that the tax attaches off-reservation on the non-Indian distributor rather than on-reservation triggering the balancing test. Prairie Band Potawatomi Nation argued that the taxable event occurred when the distributor reported fuel sales and then remitted payment based upon those sales, which would have occurred on-reservation in this instance. The Court rejected this argument, narrowly reading Kansas law as imposing its tax upon the initial receipt of the fuel no matter what the ultimate destination of the fuel, thereby foreclosing a balancing of interests under Bracker.

In addition, the Prairie Band Potawatomi Nation argued that the Kansas motor-fuel tax encumbers the tribal motor-fuel tax. The U.S. Supreme Court in response minimized the governmental interest of the Nation in collecting taxes and stated that the profit from the tribal gas station returns to the Nation as owner of the station. The Court went on to imply that the Nation was overreaching by opposing the state tax impacting the motor fuel sales on-reservation — "[t]he Nation merely seeks to increase those revenues by purchasing untaxed fuel."

Finally, the Nation asserted that the state tax was discriminatory because fuel sold or delivered to other sovereigns was exempted. In response, the Court held that the Nation "is not similarly situated to the sovereigns exempted" based on the maintenance of roads and bridges by the state. The Court failed to mention that most Tribal Nations would gladly allow states to retrocede former tribal territory to the Nations, so this argument is more about state insistence upon jurisdiction than on maintenance provided. The dissent in the case revealed that the record indicates a different reality, that Kansas fails to provide maintenance "even on their own roads running through the reservation."

Through these cases, the Court has sent a strong message to states that if the statute is worded a certain way in terms of legal incidence, then state taxation will be allowed on motor fuel en route to tribal territory.

3. Hotel Occupancy Tax in Indian Country: Race of Land Owner

On March 29, 2001, the U.S. Supreme Court added another chapter to the non-Indian taxation drain on reservations. In Atkinson Trading Co., Inc. v. Shirley, the Court held that the Navajo Nation could not impose a hotel occupancy tax on a licensed

169. Id. at 103.
170. Id. at 105, 112.
171. Id. at 108.
172. Id. at 108-09.
173. Wagnon, 546 U.S. at 114.
174. Id.
175. Id.
176. Id. at 115.
177. Id.
178. Wagnon, 546 U.S. at 129 (Ginsburg & Kennedy, JJ., dissenting).
trading post operating within the reservation boundaries on fee land.\textsuperscript{180} The Court, led by Chief Justice Rehnquist, based this holding on the premise that "[a]n Indian tribe’s sovereign power to tax—whatever its derivation—reaches no further than tribal land."\textsuperscript{181} Thus, distinguishing the legal boundaries of the Navajo Reservation from establishing the Tribe’s taxing jurisdiction, as is the case for states and counties,\textsuperscript{182} from the actual parcels of tribal lands held by the Tribe or tribal members as composing the tax base.

The Court, reinterpreting previous decisions in the area, stated that the Tribes could not be described as sovereigns in the sense of exerting full jurisdiction over all citizens within reservation boundaries.\textsuperscript{183} In a footnote, the Court found relevant that the General Allotment Act equated land alienation with "the dissolution of tribal affairs and jurisdiction," thus indicating the congressional intent that non-Indians purchasing the tribal lands from the United States would not be subject to tribal jurisdiction.\textsuperscript{184} Relying on the judicially constructed \textit{Montana} test, the Court found that the hotel occupancy tax was neither related to a consensual relationship with the Navajo Nation, nor was it "necessary to vindicate the Navajo Nation’s political integrity" and therefore, civil jurisdiction over the non-Indian hotel occupiers was struck as an invalid extension of tribal authority.\textsuperscript{185}

Whereas all nations in the global community are recognized as having jurisdiction including taxation jurisdiction within their legal boundaries, the U.S. Supreme Court has, through its judicial opinions invented a limitation for Tribal Nations based on the race of the citizen entering the reservation boundaries and buying land within those boundaries. This decision furthers the philosophy of colonization by denying to Tribal Nations full legal and regulatory authority within their territorial boundaries, forcing the Nations to accept regulation and concomitant taxing authority by the individual U.S. states reaching into the tribal territory.

\textbf{F. Taxation of Tribal Member Property and Income within Indian Country}

In the U.S. Constitution, the rights of individuals are clearly spelled out and the basis of government is said to derive from individuals acting collectively as evidenced in the preamble "We, the People."\textsuperscript{186} The Constitution expressly includes language that Indians are not taxed.\textsuperscript{187} This appears to be an individual right, although the Tribal

\textsuperscript{180}. Id. at 659.
\textsuperscript{181}. Id. at 653 (footnote omitted).
\textsuperscript{182}. If legal jurisdiction was premised on how the land was acquired to the present ownership, every private landowner would trace their title back to the U.S. government and then to the Tribal Nations who entered treaties with the United States. Therefore, the same argument applied to states—their taxing jurisdiction extending only as far as the actual land owned by the states—would fail to leave any land except the seat of state government and state parks within the state’s taxing jurisdiction. Privately-owned fee land does not compose “state land” yet the states assert taxing jurisdiction based on the legal boundaries they have drawn. For Tribes, the legal boundaries are drawn around their respective reservations or Indian communities and tribal taxing jurisdiction should fall within those boundaries regardless of the ownership of the land.
\textsuperscript{183}. Id. at 650–51.
\textsuperscript{184}. Id. at 650 n. 1 (citing \textit{Mont. v. U.S.}, 450 U.S. 544, 559 n. 9 (1981)).
\textsuperscript{185}. \textit{Atkinson Trading}, 532 U.S. at 659.
\textsuperscript{186}. U.S. Const. preamble.
\textsuperscript{187}. Id. at art. 1, § 2, cl. 3.
Nations view themselves as a collective in the names they recognize for themselves as generally translating to simply "the People." From this collective perspective, the individual tax status of tribal members has been an area that the Tribal Nations have sought to protect from federal and state intrusion as well.

In 1973, a Navajo tribal member who derived all of her income from on-reservation sources challenged Arizona's imposition of a state income tax in *McClanahan v. Arizona State Tax Commission.* The U.S. Supreme Court reviewed the landscape of federal Indian law and regarded the federal treaties and statutes as a relevant "backdrop" in deciding the issue before it. The Treaty between the Navajo Nation and the U.S. government in 1868 was cited for the proposition that the Navajo intended to reserve a sovereign domain and exclude non-Indian interference from their lands. The Treaty read with both the Arizona Enabling Act, which exempts tribal lands from state jurisdiction, and the federal policy on Indian tax-exempt status were grounds for the Court's holding that state taxation was void for tribal member income derived from on-reservation sources.

This result did not end the state attempts to reach tribal member income through taxation. In *Oklahoma Tax Commission v. Sac and Fox Nation,* the state argued that state income taxes were valid against tribal members regardless of their residence within Indian Country. In fact, the state asserted that tribal member income was subject to both state and tribal taxation (as well as federal). The U.S. Supreme Court took a narrow view of the *McClanahan* decision and held that "[t]o determine whether a tribal member is exempt from state income taxes under *McClanahan,* a court first must determine the residence of that tribal member." The Court also spoke to the Oklahoma Tax Commission as a prior litigant and reiterated the point that Indian Country was not solely reservation lands and that the Court would not distinguish the Tribal Nations on such a distinction.

Two years later in *Chickasaw Nation,* the state of Oklahoma imposed its income tax on tribal members employed by the Chickasaw Nation, but living on lands outside of Indian Country. The Chickasaw Nation based its claim of tax exemption for all tribal members on the Treaty of Dancing Rabbit Creek, which contained explicit language on freedom from external governmental control for the Chickasaw and their descendants.

The Government and people of the United States are hereby obliged to secure to the said Chickasaw Nation of Red People the jurisdiction and government of all the persons and

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189. *Id.* at 172.
190. *Id.* at 174–75.
191. *Id.* at 181.
193. *Id.* at 119.
194. *Id.*
195. *Id.* at 124.
196. *Id.* at 124–25.
197. 515 U.S. 450.
198. *Id.* at 462–63.
property that may be within their limits west, so that no Territory or State shall ever have a
right to pass laws for the government of the [Chickasaw] Nation of Red People and their
descendants . . . but the U.S. shall forever secure said [Chickasaw] Nation from, and
against, all [such] laws . . . .

The Court stated that the treaty language only applied to the limits of the land that was
controlled by the Chickasaw Nation. Furthermore, the Court characterized the Tribe’s
position as “conferring super-sovereign authority to interfere with another jurisdiction’s
sovereign right to tax income, from all sources, of those who choose to live within that
jurisdiction’s limits.” Therefore, the Court held that the state could assess income
taxes against tribal members employed by the Tribe, but housed outside of trust lands,
and noted in a footnote that federal income taxation was applicable to tribal members as
well.

The Court failed to properly consider the historical context within which the
Chickasaw Nation case arose. The land base of the Tribal Nations located in Oklahoma
was virtually stolen from underneath them in the greedy rush for oil. The ability for
tribal members to live on the limited parcels of tribal land left within Oklahoma was an
unrealistic standard to hold them to when they had already evidenced their continued
identity as part of the Chickasaw Nation by seeking employment from their tribal
government. Through this opinion, the Court further narrowed the tax base from which
the Tribal Nations can collect revenue without unduly burdening tribal citizens who must
also pay federal and state taxes.

In the area of tribal personal property, there are few items to which tax may attach
within Indian Country due to the generational poverty experienced by the majority of
tribal members as a result of the colonization of tribal lands, resources, and legal
authority. However, the states have intruded into the tribal lands and attempted to
impose taxes on motor vehicles as a way of reaching tribal property. This discussion
begins with the revisitiation of the Moe decision, where the state of Montana imposed a
property tax on vehicles owned by tribal members living on the reservation as part of
state registration procedures. The Court relied heavily on its decisions in
McClanahan and Mescalero to conclude that federal law demanded that the state be
barred from imposing its taxes on Indians living on reservation lands. In Moe, the
Court’s opinion dealt with the denial of the state property tax in a cursory manner.

In Colville, the state asserted excise taxes against tribal members’ automobiles,
mobile homes, travel trailers, and campers both on and off the reservation. The Court relied on its holding in *Moe* to find that the Washington taxes at issue were not different in character, but only in name. The issue of state taxation of on-reservation property could not be so easily circumvented according to the Court.

After Montana and Washington both unsuccessfully tried to impose property taxes on tribal members' vehicles, Oklahoma attempted to do the same. In *Sac and Fox Nation*, the Court soundly rejected the state's excise taxes and registration fees on tribal members' vehicles within Indian country.

Oklahoma taxes are no different than those in *Moe* and *Colville*. Like the taxes in both those cases, the excise tax and registration fee are imposed in addition to a sales tax; the two taxes are imposed for use both on and off Indian country; and the registration fees are assessed annually based on a percentage of the value of the vehicle. Oklahoma may not avoid our precedent by avoiding the name "personal property tax" here any more than Washington could in *Colville*.

The Court did instruct the state that had it changed more than "nomenclature" in assessing its motor vehicle tax, the result may have been different.

In terms of tribal members residing within tribal territory and employed by tribal entities, the Court has recognized that, tribal sovereignty preempts state income taxation. Likewise, tribal member property within the tribal territory may not be reached by state regulation and taxation, such as motor vehicle registration fees. While the winnowing away of the legal jurisdiction of Tribal Nations has been the trend since the formation of the United States, the inherent sovereignty of tribal governments over tribal members within Indian country remains in the face of state attempts to intrude in this domain.

IV. CONCLUSION: COLONIZATION OF TRIBAL NATIONS MUST BE REPLACED WITH RECOGNITION OF TRIBAL SOVEREIGNTY TO ENABLE ECONOMIC DEVELOPMENT

The United States government arose from a dispute over taxation and the legitimacy of Great Britain asserting heavy tribute from the colonies. This historical context is ironic in terms of the current assertion of taxation by the Euro-Americans over Tribal Nations. As the colonies waged war for their independence from Great Britain, they embarked on a course of colonization of mid-North America by illegally taking tribal lands and subjecting tribal peoples to inferior legal status. In the realm of taxation, the colonization process continues towards tribal peoples as the U.S. Supreme Court sanctions the continued depleting of tribal resources on behalf of state and federal government.

The United States has attempted to claim for itself tribal resources, lands, and labor. Through the allotment policy, the United States intentionally destroyed tribal
economies, leaving tribal peoples in a state of generational poverty. In the decades that followed as tribal peoples have adapted to the surrounding capitalist economy, incursions by the United States and its separate states into the legal jurisdiction of Tribal Nations has impeded the rebuilding of tribal economies and the restoration of prosperity for tribal peoples. The lands, timber, minerals, waters, air space, species, and human resources that the United States has generally coerced from Tribal Nations or outright stolen provide the foundation for the United States to maintain its status as a super power in the global community to date. To impose federal and state taxes after stripping Tribal Nations of the majority of their material possessions and wealth resources adds insult to injury.

Another problem in the area of federal taxation stems from a lack of understanding by the European descendants regarding the Tribal Nations' perspectives on the purpose and process of government wealth. For Tribal Nations, when the people have very little beyond the essentials for life, demanding payment from them is contrary to tribal beliefs. By seeking to impose state and federal taxation on every possible transaction within tribal territory, the U.S. mentality of colonization of tribal jurisdictions can be likened to a feudal lord demanding tribute. This demand for tribute by the Tribal Nations is completely contrary to the history of North America, tribal sovereignty, and the basic goal of tribal government self-sufficiency and can only be viewed as an extension of colonization over tribal peoples.

Since the Euro-Americans first entered this continent, the Tribal Nations have attempted to coexist peacefully within their own jurisdictions based on the treaties entered into with the United States. However, the United States has failed to honor the agreements reached with the Tribes. Tribal leadership has expressed the intent to work with the U.S. government and to attain peaceful communities side by side. The stance of the United States continues to be one of military threat and legal trickery to deprive Tribal Nations of a worthwhile quality of life, expression of tribal governmental authority, and respectful coexistence.

As Tatanka Iyotanka (Sitting Bull) stated during the Powder River Council in 1877, the injustices and unreasonableness of the Euro-Americans in their treatment towards Tribal Nations places the Tribes in the position of constant defense in terms of tribal resources and sovereignty.

Yet, hear me, friends! [W]e have now to deal with another people, small and feeble when our forefathers first met them but now great and overbearing. Strangely enough, they have a mind to till the soil and the love of possessions is a disease with them. These people have made many rules that the rich may break, but the poor may not! They even take tithes of the poor and weak to support the rich and those who rule. They claim this mother of ours, the Earth, for their own use, and fence their neighbors away from her; and deface her with their buildings and their refuse.

216. See Kent Nerburn, The Wisdom of the Native Americans 63 (New World Lib. 1999).

I am also told, but this I hardly believe, that their Great Chief compels every man to pay him for the land he lives upon and all his personal goods—even those he needs for his own existence—every year. I am sure that we could not live under such a law.

Id. (as stated by Charles Alexander Eastman's uncle, Santee Sioux).
This nation is like a spring freshet: it overruns its banks and destroys all who are in its path. We cannot dwell side by side. Only seven years ago we made a treaty by which we were assured that the buffalo country should be left to us forever. Now they threaten to take that from us also. My brothers, shall we submit? Or shall we say to them: First kill me, before you can take possession of my fatherland? Since the 1700s, Tribal Nations have made enormous efforts to negotiate and live in peace with the Euro-Americans. It is time for the United States through its legislature and judiciary to honor the status and sovereignty of Tribal Nations.

The injustices perpetrated against Tribal Nations during the early 1900s through the 2000s by the federal government while purporting to exercise a fiduciary duty to the Tribes must be answered and remedied. Without the legal quagmire now asserted in the taxation realm to form three levels of taxation on reservations and race-based distinctions on tribal transactions, the Tribal Nations would be in a position to rebuild economically and independently their communities and provide for the health and welfare of tribal members.