# CAN TRIBES GET A RECEIPT?: SEEKING TRANSPARENCY FOR STATE SPENDING OF TRIBAL TAX DOLLARS

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*Each year states collect hundreds of millions of dollars in tax revenue from Indian country. While tribes view state taxation as an infringement upon their sovereignty, state taxation presents another issue. That is, states take the tribal tax dollars and spend the money outside of Indian country. Meanwhile, Indian country's infrastructure is significantly underdeveloped, and many tribes struggle to provide essential government services. Tribes have unsuccessfully challenged state taxation for years. Accordingly, this Article makes a more modest proposal: if states are allowed to tax tribes, states should be subjected to fiscal transparency requirements. This Article asserts that when a state taxes Indian country commerce, the state should be obligated to provide the tribe with a report accounting for the total tax revenue collected and expended within Indian country.*

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## INTRODUCTION

States deprive Indian tribes of hundreds of millions of dollars in tax revenue each year.[1] Although tribes and their citizens are immune from state taxation on reservations, the Supreme Court allows states to tax Indian country activities involving non-Indians.[2] Once the state[3] assesses a tax, the tribe is presented with a quandary. The tribe can tax the same transaction as the state,[4] resulting in dual taxation. Events are only taxed by the state outside of Indian country, so a tribe's choice to tax puts reservation commerce at a disadvantage.[5] Alternatively, tribes can forego taxing.[6] Most tribes choose the latter, which severely diminishes tribes' ability to raise revenue.[7]

Despite contributing hundreds of millions of dollars to state coffers each year, the available evidence suggests tribes are not receiving much in return for the tax dollars that states take. Washington State collects over $40 million a year in tax revenue from the Tulalip Tribes;[8] however, the Tribes deliver all government services on the reservation.[9] Likewise, Connecticut taxes activities on the Mashantucket Pequot Tribal Nation, but it provides no services to the Pequot

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1. Maya Srikrishnan et al., *Tribes Need Tax Revenue. States Keep Taking It*, CTR. FOR PUB. INTEGRITY (Dec. 20, 2022), https://publicintegrity.org/inequality-poverty-opportunity/taxes/unequal-burden/tribes-need-tax-revenue-states-keep-taking-it/ [https://perma.cc/7G9J-BH9V].

2. This Article uses the term "Indian" rather than "Native American" to denote the Indigenous Peoples of present-day North America because it is the legal designation used in the U.S. Code. *See generally* 25 U.S.C. §§ 1–5807. It is also the official title of many Native Nations. *See, e.g.*, *Who We Are*, LITTLE SHELL TRIBE OF CHIPPEWA INDIANS, https://www.montanalittleshelltribe.org [https://perma.cc/KTB6-9D9U] (last visited Oct. 3, 2024); *The Narragansett Indian Tribe*, NARRAGANSETT INDIAN TRIBE, https://narragansettindiannation.org [https://perma.cc/W3KC-VZJZ] (last visited Oct. 3, 2024); *About Poarch Creek Indians*, POARCH BAND OF CREEK INDIANS, https://pci-nsn.gov [https://perma.cc/TJ3R-JAG9] (last visited Oct. 3, 2024); *About Us*, QUINAULT INDIAN NATION, http://www.quinaultindiannation.com/171/About-Us [https://perma.cc/2P29-9THL] (last visited Nov. 14, 2024).

3. When used in this Article, "state" denotes the state and its subdivisions, including counties and cities.

4. Tribes have the inherent sovereign power to tax. *See* Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Washington v. Confederated Tribes of the Colville Indian Rsrv., 447 U.S. 134 (1980).

5. Adam Crepelle, *Taxes, Theft, and Indian Tribes: Seeking an Equitable Solution to State Taxation of Indian Country Commerce*, 122 W. VA. L. REV. 999, 1017–18 (2020).

6. *Id.* at 1018.

7. *Id.*

8. *See* Tulalip Tribes v. Washington, 349 F. Supp. 3d 1046, 1052 (W.D. Wash. 2018).

9. *Id.* at 1060. The parties reached a settlement following the case. *See* Jerry Cornfield, *Deal Ends Legal Fight and Allows Tulalips a Cut of Sales Tax*, HERALDNET (Jan. 29, 2020, 9:13 PM), https://www.heraldnet.com/news/deal-ends-legal-fight-and-allows-tulalips-a-cut-of-sales-tax [https://perma.cc/2MG5-NF9Q].

Reservation.[10] Montana imposes over $300 million a year in taxes on Indian country, yet it only remits $10.6 million to the tribes within its borders.[11] States tax even purely intertribal transactions.[12] Numerous other examples exist of states taking from tribes and delivering little in return to them.[13] Hence, most reservation roads are unpaved;[14] approximately 50% of tribal homes lack access to safe water;[15] nearly 20% of tribal residents lack access to broadband;[16] and over 10% of tribal homes lack electricity compared to less than 1% of American homes as a whole.[17]

While state taxation is an affront to tribal sovereignty, there is another problem—tribes do not know where the money siphoned from their reservations goes. States have no obligation to report how much money they take from Indian country or how the money is spent. Lack of transparency means a state can drain wealth from Indian country and use the tribal revenue to subsidize the state budget. Sans reporting requirements, the public cannot gauge whether tribes are receiving equitable fiscal treatment. Keeping Indian country tax dollars in the shadows enables states to continue the United States' legacy of extracting wealth from tribes.

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10. *Examining the Impact of the Tax Code on Native American Tribes: Hearing Before the H. Ways & Means Subcomm. on Select Revenue Measures*, 116th Cong. 2 (2020) [hereinafter *Hearing on Examining the Impact of the Tax Code*] (statement of Rodney Butler, Chairman, Mashantucket Pequot Tribal Nation).

11. *Policy Basics: Taxes in Indian Country, Part 2: Tribal Governments*, MONT. BUDGET & POL'Y CTR. (Nov. 2017), https://mbadmin.jaunt.cloud/wp-content/uploads/2017/11/Taxes-in-Indian-Country-Tribal-Governments.pdf [https://perma. cc/6K6D-SWZJ] ("In 2016, total statewide revenue collected from these taxes totaled $347.6 million, with $10.6 million being remitted to tribal governments.").

12. *See, e.g.*, Big Sandy Rancheria Enters. v. Bonta, 1 F.4th 710, 714 (9th Cir. 2021); Ute Mountain Ute Tribe v. Ariz. Dep't of Revenue, 524 P.3d 271, 272 (Ariz. Ct. App. 2023).

13. *See infra* Part III.

14. U.S. COMM'N ON C.R., BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS 168 (2018), https://www.usccr.gov/files/pubs/2018/12-20-Broken-Promises.pdf [https://perma.cc/ZTU3-Q342] ("There are 13,650 miles of roads and trails that are owned and maintained by Indian tribes (93 percent of which are unpaved), and about 29,400 miles of roads owned and maintained by BIA (75 percent of which are unpaved). These roads are some of the most 'underdeveloped, unsafe, and poorly maintained road networks in the nation.'").

15. *Executive Summary* to DEMOCRATIC STAFF OF THE H. COMM. ON NAT. RES., 114TH CONG., REP. ON WATER DELAYED IS WATER DENIED: HOW CONGRESS HAS BLOCKED ACCESS TO WATER FOR NATIVE FAMILIES (2016), http://blackfeetnation.com/wp-content/uploads/2016/10/House-NRC-Water-Report-Minority-10-10-16.pdf [https://perma. cc/R4KW-SRTT] ("Over a half million people—nearly 48% of tribal homes—in Native communities across the United States do not have access to reliable water sources, clean drinking water, or basic sanitation.").

16. U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-104421, TRIBAL BROADBAND: NATIONAL STRATEGY AND COORDINATION FRAMEWORK NEEDED TO INCREASE ACCESS 17–18 (2022) ("Approximately 18 percent of people living on tribal lands lacked access to broadband, compared to about 4 percent of people living in non-tribal areas.").

17. U.S. COMM'N ON C.R., *supra* note 14, at 171 ("Although energy resources are rich in Indian Country, an estimated 14 percent of households in Indian Country have no access to electricity—ten times higher than the national average.").

Solutions to state taxation of tribal commerce have been elusive. Several tribes have made unsuccessful attempts to preempt state taxes in court.[18] Tribes have urged Congress to prohibit state taxation of Indian country commerce; however, states have stifled tribal efforts.[19] Scholars have made constitutional arguments against state taxation of tribal commerce.[20] Others have advocated for tribal–state tax compacts.[21] Scholarship has yet to address a different question: where does the money states take from Indian country go?

Accordingly, this Article proposes reporting requirements for state taxation of tribal commerce. Transparency means sharing information with the public, and it is widely considered a social good.[22] In fact, transparency is essential for democratic governance.[23] By making information freely available, the public can hold government officials accountable.[24] Thus, fiscal transparency relating to Indian country tax dollars could lead to more equitable revenue distribution.

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18. *See infra* Parts II–III.

19. FREDERICKS PEEBLES & MORGAN, LLP, WHITE PAPER OF THE MANDAN HIDATSA AND ARIKARA NATION ON STATE TAXATION OF INDIAN OIL AND GAS DEVELOPMENT (2015), *in* BUREAU OF INDIAN AFFS., ADDRESSING THE HARMS OF DUAL TAXATION IN INDIAN COUNTRY THROUGH MODERNIZING THE INDIAN TRADER REGULATIONS 12, 16 (2017), https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/39%20-%20Ewiiaapaayp%20Band%20of%20Kumeyaay%20Indians%204%20of%204.pdf [https://perma.cc/7B7K-DBVG] ("Since the *Cotton* decision in 1989, Congress has considered numerous bills supported by tribes and tribal organizations that would alleviate the dual taxation problem, yet these bills have never made any progress through Congress due to fierce opposition from states.").

20. *See, e.g.*, Richard D. Agnew, *The Dormant Indian Commerce Clause: Up in Smoke?*, 25 AM. INDIAN L. REV. 353 (2001); Jeremy Rabkin, *Commerce with the Indian Tribes: Original Meanings, Current Implications*, 56 IND. L. REV. 279 (2023); Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 TAX L. 897, 989 (2010).

21. *See, e.g.*, Mark J. Cowan, *State-Tribal Tax Compacts: Stories Told and Untold*, FED. RSRV. BANK OF MINNEAPOLIS, CTR. FOR INDIAN COUNTRY DEV. (Sept. 2021), https://www.minneapolisfed.org/~/media/assets/papers/cicd-policy-discussion-papers/2021/state-tribal-tax-compacts-stories-told-and-untold.pdf [https://perma.cc/4YVT-WWA6]; Lance Morgan, *The Rise of Tribes and the Fall of Federal Indian Law*, 49 ARIZ. ST. L.J. 115 (2017). For a critique of tribal-state tax compacts, see Pippa Browde, *Sacrificing Sovereignty: How Tribal-State Tax Compacts Impact Economic Development in Indian Country*, 74 HASTINGS L.J. 1 (2022).

22. *Government Accountability & Transparency*, FREEDOM HOUSE, https://freedomhouse.org/issues/government-accountability-transparency [https://perma.cc/8G5C-2GSV] (last visited Oct. 7, 2024).

23. Michael J. Klarman, *The Degradation of American Democracy—And the Court*, 134 HARV. L. REV. 1, 38 (2020) ("Democracy requires that citizens be able to hold their government accountable, which is possible only if the government is sufficiently transparent.").

24. Transparency and Open Government, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4685, 4685 (Jan. 21, 2009) ("Transparency promotes accountability and provides information for citizens about what their Government is doing. Information maintained by the Federal Government is a national asset.").

Fiscal transparency relating to tribal taxation is also legally relevant. Under Supreme Court precedent, a state's ability to tax Indian country commerce depends upon the balance of tribal, state, and federal interests in the activity the state seeks to tax.[25] Balancing tests are inherently vague, so courts have much leeway to reach their desired result.[26] Although reporting requirements will not necessarily change the outcome of cases, accurate data about the state services rendered to Indian country in exchange for the money taken from Indian country is germane to the analysis. At a minimum, accurate numbers would enable the public to assess whether courts are reasonably balancing the sovereigns' interests.

The remainder of this Article proceeds as follows. Part I begins by providing a historical overview of state taxation in Indian country—from the ratification of the U.S. Constitution to the Supreme Court's landmark 1989 decision in *Cotton Petroleum Corp. v. New Mexico*.[27] Part II discusses how courts have applied *Cotton Petroleum* in tribal–state taxation disputes. Part III shows that states are collecting significant sums of money from Indian country but not delivering much to tribes in return. Part IV proposes fiscal transparency requirements for state taxation of Indian country. A conclusion follows.

## I. State Taxation of Indian Country

Today, the rules governing state taxation of Indian country are complex,[28] but this was not always the case. Tribes existed as sovereigns since time out of mind.[29] In recognition of tribes' sovereign status, the U.S. Constitution declared "Indians not taxed."[30] Over time, this clear rule devolved into "a nebulous balancing test."[31] The remainder of this Part traces the development of state taxation in Indian country.

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25. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144–45 (1980).

26. Taylor v. Sturgell, 553 U.S. 880, 901 (2008) ("Most obviously, it could significantly complicate the task of district courts faced in the first instance with preclusion questions. An all-things-considered balancing approach might spark wide-ranging, time-consuming, and expensive discovery tracking factors potentially relevant under seven- or five-prong tests. And after the relevant facts are established, district judges would be called upon to evaluate them under a standard that provides no firm guidance."); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1186 (1989) ("For when balancing is the mode of analysis, not much general guidance may be drawn from the opinion—just as not much general guidance may be drawn from an opinion setting aside a single jury verdict because in that particular case the evidence of negligence was inadequate.").

27. 490 U.S. 163 (1989).

28. Browde, *supra* note 21, at 5 ("The United States Supreme Court's jurisprudence on what, where, when, and how a state may impose its taxing authority in Indian Country may be one of the most complex and unpredictable legal issues tribes and states continue to face today.").

29. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 542–43 (1832) ("America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.").

30. U.S. CONST. art. I, § 2, cl. 3.

31. McGirt v. Oklahoma, 591 U.S. 894, 972 (2020) (Roberts, C.J., dissenting).

### *A. History*

Control over Indian affairs was contested at the United States' founding.[32] Under the Articles of Confederation, the federal government had exclusive power over Indian affairs as long as federal authority did not infringe upon state sovereignty.[33] Bifurcated authority over Indian affairs led to frequent conflicts with tribes,[34] and James Madison claimed permitting states to exercise some authority over Indian affairs was a primary defect of the Articles of Confederation.[35] To eliminate disputes over what government managed tribal relations, the Constitution's Indian Commerce Clause vested the federal government with the sole and exclusive right to regulate commerce with the Indian tribes.[36] After the Constitution's ratification, states knew they had no power over tribal land and never

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32. ADAM CREPELLE, BECOMING NATIONS AGAIN: IN PURSUIT OF POLITICAL AND ECONOMIC FREEDOM IN INDIAN COUNTRY (forthcoming, Cambridge Univ. Press) (manuscript at 72–73) (on file with author).

33. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4.

34. THE FEDERALIST NO. 3, at 17 (John Jay) (Jacob Ernst Cooke ed. 1961) ("[T]here are several instances of Indian hostilities having been provoked by the improper conduct of individual States, who, either unable or unwilling to restrain or punish offenses, have given occasion to the slaughter of many innocent inhabitants.").

35. James Madison, *Vices of the Political System of the United States*, *in* THE PAPERS OF JAMES MADISON 345, 348 (William T. Hutchinson et al. eds., 1962) ("Examples of this are numerous and repetitions may be foreseen in almost every case where any favorite object of a State shall present a temptation. Among these examples are the wars and Treaties of Georgia with the Indians.").

36. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 62 (1996) ("If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes."); United States v. Forty-Three Gallons of Whiskey, 93 U.S. (3 Wall.) 188, 194 (1876) ("This was seen by the convention which framed the Constitution; and Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes,—a power as broad and as free from restrictions as that to regulate commerce with foreign nations. The only efficient way of dealing with the Indian tribes was to place them under the protection of the general government."); *In re* Kansas Indians, 72 U.S. (5 Wall.) 737, 755 (1866) ("If under the control of Congress, from necessity there can be no divided authority."); United States v. Holliday, 70 U.S. (3 Wall.) 407, 418 (1865) ("The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of the member of the tribe with whom it is carried on.").

attempted to tax tribal commerce.[37] Thus, the first U.S. Congress implemented laws regulating trade between Indians and non-Indians.[38]

In the 1832 case of *Worcester v. Georgia*,[39] the Supreme Court clarified the scope of state authority over Indian country. The case arose because Georgia extended its laws over the Cherokee Nation.[40] The constitutionality of Georgia's laws reached the Supreme Court, and Chief Justice Marshall opined that the state laws "interfere[d] 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."[41] He further explained:

> By the constitution, the regulation of commerce among the Indian tribes is given to congress. This power must be considered as exclusively vested in congress, as the power to regulate commerce with foreign nations, to coin money, to establish post offices, and to declare war. It is enumerated in the same section, and belongs to the same class of powers.[42]

Chief Justice Marshall emphasized that tribes "have been placed by federal authority, with but few exceptions, on the same footing as foreign nations."[43] As a result, Chief Justice Marshall concluded that "the laws of Georgia can have no force" inside the Cherokee Nation.[44]

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37. Scott A. Taylor, *The Unending Onslaught on Tribal Sovereignty: State Income Taxation of Non-Member Indians*, 91 MARQ. L. REV. 917, 928 (2008) ("A review of early state tax laws shows no attempts to tax tribes. . . . [T]he states viewed Indian Country as a barrier to the exercise of state power."); *see also* President Andrew Jackson, Second Annual Message Before Congress (Dec. 6, 1830), *reprinted in* GERHARD PETERS & JOHN T. WOOLLEY, U.C. SANTA BARBARA, THE AMERICAN PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/second-annual-message-3 [https://perma.cc/RS93-LF2Q] (last visited Oct. 7, 2024) ("As individuals we may entertain and express our opinions of their acts, but as a Government we have as little right to control them as we have to prescribe laws for other nations.").

38. *See* Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137, 138 (codified as amended at 25 U.S.C. §§ 177, 261–264).

39. 31 U.S. (6 Pet.) 515 (1832).

40. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15 (1831) ("This bill is brought by the Cherokee nation, praying an injunction to restrain the state of Georgia from the execution of certain laws of that state, which, as is alleged, go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force.").

41. *Worcester*, 31 U.S. (6 Pet.) at 561.

42. *Id.* at 580–81.

43. *Id.* at 581.

44. *Id.* at 561.

*Worcester* remained the guide star of federal Indian law for years,[45] and state taxation of tribal commerce was categorically prohibited.[46] Even during the Civil War, no state in the Union or Confederacy ever attempted to collect taxes within the territory of an Indian tribe.[47] Likewise, the Supreme Court upheld tribal immunity from state taxes soon after the Civil War.[48] Though the United States stopped entering treaties with tribes in 1871,[49] existing treaties remained in full force, and the United States continued to negotiate agreements with tribes.[50] Tribes were subject to federal control, but they were completely separate from the states.[51]

However, the United States' view on tribal existence shifted sharply during the 1880s.[52] Whites desired Indian land, and they wanted Indians to abandon their Indigenous cultures. Therefore, the General Allotment Act of 1887 ("GAA") was designed to further both objectives.[53] The GAA divided reservations into 160-acre

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45. Haaland v. Brackeen, 599 U.S. 255, 312 (2023) (Gorsuch, J., concurring) ("In the end, President Jackson refused to abide by the Court's decision in *Worcester*, precipitating the Trail of Tears. . . . But just as this Court had no power to enforce its judgment, President Jackson had no power to erase its reasoning. So the rule of *Worcester* persisted in courts of law, unchanged, for decades." (citation omitted)).

46. McClanahan v. Ariz. Tax Comm'n, 411 U.S. 164, 169 (1973) ("Although *Worcester* on its facts dealt with a State's efforts to extend its criminal jurisdiction to reservation lands, the rationale of the case plainly extended to state taxation within the reservation as well.").

47. Taylor, *supra* note 37, at 932–33 ("This provision shows that the dominant legal paradigm of political separation for tribes continued in the Confederacy. . . . No Confederate states attempted to tax tribes or activities within tribal boundaries.").

48. *In re* New York Indians, 72 U.S. (5 Wall.) 761, 771 (1867) ("We must say, regarding these reservations as wholly exempt from State taxation, and which, as we understand the opinion of the learned judge below, is not denied, the exercise of this authority over them is an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations."); *In re* Kan. Indians, 72 U.S. (5 Wall.) 737, 757 (1866) ("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 State laws.").

49. 25 U.S.C. § 71.

50. *Brackeen*, 599 U.S. at 313 (Gorsuch, J., concurring) ("And the law did not abridge, nor could it have validly abridged, the long-settled view of tribal sovereignty. In fact, the United States proceeded to enter into roughly 400 further executive agreements with the Tribes practically indistinguishable from the treaties that came before.").

51. Harkness v. Hyde, 98 U.S. 476, 478 (1878) ("The territory reserved, therefore, was as much beyond the jurisdiction, legislative or judicial, of the government of Idaho, as if it had been set apart within the limits of another country, or of a foreign State.").

52. *See* H.R. REP. NO. 46-1576, at 10 (1880); FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 199 (abr. ed. 1986).

53. *See* General Allotment Act of Feb. 8, 1887, Pub. L. No. 49–105, ch. 119, 24 Stat. 388, *repealed by* Act of June 18, 1934, Pub. L. No. 73-383, ch. 576, 48 Stat. 984, Act of Nov. 7, 2000, Pub. L. No. 106–462, tit. I, § 106(a)(1), 114 Stat. 1991, 2007 (codified as amended at 25 U.S.C. §§ 2201–2221 (2018)).

parcels for Indian heads of household[54] and opened the remaining lands to white settlers.[55] Bringing white settlers onto reservations was supposed to inspire Indians to abandon their traditional lifestyles in favor of white ways.[56] According to President Theodore Roosevelt, "[t]he General Allotment Act is a mighty pulverizing engine to break up the tribal mass. . . . The Indian should be treated as an individual—like the white man."[57] Hence, the entire goal of the GAA was to eliminate tribal existence.[58]

Consistent with the sentiments of the Allotment Era, the Supreme Court allowed many intrusions upon tribal sovereignty.[59] And in 1898, the Supreme Court allowed states to tax reservation commerce for the first time in *Thomas v. Gay*.[60] *Thomas* arose because Oklahoma imposed a tax on non-Indian-owned cattle grazing on reservations.[61] The ranchers argued that the Indian Commerce Clause and tribal treaties prohibited the Oklahoma tax, but the Supreme Court disagreed.[62] According to the Court, the U.S. Constitution posed no barrier to state taxation of reservation

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54. *See* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 25 (7th ed. 2019); Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, and History*, 49 IDAHO L. REV. 519, 521 (2013).

55. *See* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 335–36 (1998) ("Within a generation or two, it was thought, the tribes would dissolve, their reservations would disappear, and individual Indians would be absorbed into the larger community of white settlers."); DeCouteau v. Dist. Cnty. Ct. for Tenth Jud. Dist., 420 U.S. 425, 462 (1975) (Douglas, J., dissenting) ("The purpose was not to alter or change the reservation but to lure white settlers onto the reservation whose habits of work and leanings toward education would invigorate life on the reservation."); Mattz v. Arnett, 412 U.S. 481, 496 (1973) ("Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways."); *see also* Pommersheim, *supra* note 54, at 521–22.

56. *DeCouteau*, 420 U.S. at 462 n.2 (Douglas, J., dissenting) ("This reservation will be quickly settled by whites, bringing the arts of civilization, establishing schools in every township, so that you can send your children to school.").

57. President Theodore Roosevelt, First Annual Message Before Congress (Dec. 3, 1901), *reprinted on* GERHARD PETERS & JOHN T. WOOLLEY, U.C. SANTA BARBARA, THE AMERICAN PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/first-annual-message-16 [https://perma.cc/JPP2-Q2HJ].

58. County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 254 (1992) ("The objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large.").

59. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); United States v. Kagama, 118 U.S. 375 (1886); United States v. McBratney, 104 U.S. 621 (1881).

60. 169 U.S. 264, 282–83 (1898); Pomp, *supra* note 20, at 989 ("*Thomas v. Gay* was the earliest case (1898) in which the Court upheld a state tax on non-Indians doing business with a tribe on a reservation.").

61. *Thomas*, 169 U.S. at 268 ("It is claimed that the legislative assembly of the Territory of Oklahoma was without power to enact the law of March 5, 1895, providing for the taxing of cattle grazing upon the Indian reservations under leases granted by the Indians.").

62. *Id.* at 274 ("It is further contended that this tax law of the Territory of Oklahoma, in so far as it affects the Indian reservations, is in conflict with the constitutional power of Congress to regulate commerce with the Indian tribes.").

commerce.[63] The *Thomas* Court also curiously asserted that the state tax did not impact the Indian lessors.[64] In reality, the state tax caused the lessees to abandon the reservation, thereby depriving the Indian lessors of rent revenue.[65] *Thomas* is better viewed as a product of the Allotment Era's goal of tribal destruction than a principled interpretation of the Constitution.[66]

The U.S. Indian policy shifted in 1934 with the Indian Reorganization Act ("IRA").[67] The IRA was predicated on the notion that tribes should exist as distinct governments and cultures.[68] Accordingly, the IRA ended allotment and locked the remaining Indian lands in trust status to prevent the further loss of tribal lands.[69] The IRA contained provisions to foster tribal governance and economic development;[70] plus, tribes had the choice of whether to adopt the IRA.[71] Nonetheless, the IRA did not grant tribes political autonomy.[72] The federal government interfered in tribal

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63. *Id.* at 275 ("It was decided in *Utah & Northern Railway Co. v. Fisher*, 116 U.S. 28 [1885], that the lands and railroad of a railway company within the limits of the Fort Hill Indian reservation in the Territory of Idaho was lawfully subject to territorial taxation, which might be enforced within the exterior boundaries of the reservation by proper process.").

64. *Id.* at 273 ("But it is obvious that a tax put upon the cattle of the lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians.").

65. *Id.* at 267 ("Before these taxes became delinquent, plaintiffs in error began to remove or attempted to remove their respective property from the territory attached to Kay County for judicial purposes and beyond the limits of Oklahoma territory.").

66. *See* Pomp, *supra* note 20, at 992–94.

67. *See* Indian Reorganization Act of 1934, Pub. L. No. 73-383, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101–44 (2004)); *The Indian Reorganization Act—75 Years Later: Renewing Our Commitment to Restore Tribal Homelands and Promote Self-Determination: Hearing Before the S. Comm. on Indian Affs.*, 112th Cong. 1 (2011) [hereinafter *Hearing on the Indian Reorganization Act—75 Years Later*] (statement of Sen. Daniel K. Akaka, Chairman, S. Comm. on Indian Affs.) ("When Congress enacted the Indian Reorganization Act in 1934, its intent was very clear. Congress intended to end Federal policies of termination and allotment and begin an era of empowering tribes by restoring their homelands and encouraging self-determination.").

68. *See Hearing on the Indian Reorganization Act—75 Years Later*, *supra* note 67, at 3–4 (statement of Frederick E. Hoxie, Swanlund Chair & Prof. of Hist., Univ. of Ill.) ("For the first time in the Nation's history, the Federal Government codified in a general statute the idea that tribal citizenship was compatible with national citizenship and that Indianness would have a continuing place in American life."); CANBY, *supra* note 54, at 27; *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 972 (1972) ("The IRA reaffirmed the principles of tribal self-government.").

69. Indian Reorganization Act § 2, 48 Stat. at 984.

70. *Id.* § 10, 48 Stat. at 986; *id*. § 17, 48 Stat. at 988.

71. *Id.* § 18, 48 Stat. at 988.

72. *See* STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 11 (4th ed. 2012) ("The IRA has been criticized as paternalistic, because tribes were not consulted in its development; ethnocentric, because it promoted a system of government inconsistent with traditional Indian values; and insufficient, because tribes remained subject to substantial federal control."); Tim Giago, *Good or Bad? Indian Reorganization Act Turns 75*, HUFFINGTON POST, https://www.huffingtonpost.com/timgiago/good-or-bad-indian-reorga_b_284940.html [https://perma.cc/62MU-PVZ4] (May 25, 2011) ("To many tribal

elections and imposed constitutions on tribes that granted the federal government control of the tribe.[73] In fact, the IRA's lead author claimed it granted the federal government the power to set Indian bedtimes.[74]

By 1953, the United States abandoned any pretense of supporting tribal sovereignty and began terminating tribes in the name of "Americanizing" Indians.[75] Termination was intended to "end . . . [Indians'] status as wards of the United States."[76] While termination was ostensibly about liberating tribes from federal paternalism, termination was also about accessing tribal resources.[77] For example, when the United States terminated a tribe, the tribe's assets became subject to state taxation and open to non-Indian development.[78] Similarly, the Supreme Court ruled

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leaders it became known as the Indian New Deal, or as some skeptics called it, 'The Indian Raw Deal.' Those opposed to the Act feared that it would be detrimental to them because it would be controlled by the federal government."); *"It Set the Indian Aside as a Problem" A Sioux Attorney Criticizes the Indian Reorganization Act*, HIST. MATTERS, http://historymatters.gmu.edu/d/76 [https://perma.cc/H9Q8-WPGL] (last visited Oct. 7, 2024) ("[The Indian Reorganization Act] has substituted in place of the governing system that the Indians had prior to [its enactment], a white man's idea of how they should live, rather a paternalistic type of government . . . .").

73. Charles F. Wilkinson, *Home Dance, the Hopi, and Black Mesa Coal: Conquest and Endurance in the American Southwest*, 1996 BYU L. REV. 449, 458 (1996) (noting the IRA was adopted by the Hopi; however, opponents of the IRA voiced their opposition to the act in the traditional Hopi way–they did not show up to vote); Ivan F. Star Comes Out, *The Indian Reorganization Act at 80 Years*, INDIANZ.COM (Oct. 14, 2014), https://indianz.com/News/2014/015347.asp [https://perma.cc/J7T6-S46V] (discussing how the United States passed an eleventh hour amendment to reduce the "majority of all eligible voters" requirement to merely 30% to increase the likelihood tribes would adopt the IRA, and how 60% of tribes did not meet this threshold, yet had the IRA thrust upon them nonetheless).

74. Felix S. Cohen, *The Erosion of Indian Rights*, *1950-1953*: *A Case Study in Bureaucracy*, 62 YALE L.J. 348, 360 (1953).

75. Robert A. Williams Jr., *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 221 (1986) ("Many Indians, however, doubted the sincerity of efforts to 'Americanize' them by terminating their federally recognized status as sovereign, self-defining peoples."); Donald Lee Fixico, Termination and Relocation: Federal Indian Policy in the 1950s, at v (1980) (Ph.D. dissertation, Univ. of Okla.) (available at https://shareok.org/handle/11244/4767 [https://perma.cc/U7TA-HVDP]) ("Emphasis on education, acquiring materialistic items of white American culture, and competing with other Americans for jobs and positions in society were viewed as Americanization of Indians.").

76. H.R. Con. Res. 108, 83d Cong., 67 Stat. B132, B132 (1953) (enacted).

77. *See* Skull Valley Band of Goshute Indians v. Davis, 728 F. Supp. 2d 1287, 1305 n.30 (D. Utah 2010) (quoting Reid Peyton Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061, 1074 (1974)) ("Congress' 'major purpose' in enacting the ILTLA 'was to increase Indian income by opening Indian land to market forces and encouraging long-term leasing for commercial purposes.'"); Casey Ryan Kelly, *Orwellian Language and the Politics of Tribal Termination (1953–1960)*, 74 W.J. COMMC'N 351, 357 (2010) ("They calculated that termination would be a cost-efficient way to develop tribal natural resources.").

78. *See* DONALD L. FIXICO, THE INVASION OF INDIAN COUNTRY IN THE TWENTIETH CENTURY: AMERICAN CAPITALISM AND TRIBAL NATURAL RESOURCES 86, 89–90 (2d ed.

the federal government could take tribal property without having to provide just compensation under the Fifth Amendment's Takings Clause.[79] To further assimilation and open reservations, the United States relocated Indians from their reservations to major metropolitan areas.[80]

Termination began to wane in the late 1950s as a result of the broader civil rights movement.[81] Thus, in 1959, the Supreme Court forbade state courts from exercising civil jurisdiction over Indian country disputes against Indian defendants because state court jurisdiction interfered with tribal self-government.[82] Applying similar reasoning in 1965, the Supreme Court barred Arizona from imposing taxes on a non-Indian business operating on the Navajo Nation because Congress had not authorized the tax nor was Arizona delivering any services to the reservation.[83] President Lyndon Johnson, a civil rights advocate,[84] delivered a Special Message to Congress in 1968 urging "a policy of maximum choice for the American Indian: a

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2011); C. Matthew Snipp, *American Indians and Natural Resource Development: Indigenous Peoples' Land, Now Sought After, Has Produced New Indian-White Problems*, 45 AM. J. ECON. & SOCIO. 457, 462–63 (1986) ("The initiatives following H.C.R. 108 made available to non-Indians 1.4 million acres of land and severed relations with tribes in four states."); Donald Fixico, *Termination and Restoration in Oregon*, OR. ENCYC., https://www.oregonencyclopedia.org/articles/termination_and_restoration [https://perma.cc/QH3N-RJ8Z] (Mar. 28, 2024) ("Timber, water rights, oil, and other natural resources were at stake on Indian reservations, and U.S.–Indian treaties would become meaningless with the removal of trust status. In essence, the revocation of the federal government's responsibility to protect Indian rights under treaty agreements make Indian property holders vulnerable to opportunists.").

79. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 288–89 (1955).

80. Indian Relocation Act of 1956, Pub. L. No. 84-959, 70 Stat. 986, 986 (1956).

81. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954); Exec. Order No. 11399, 33 Fed. Reg. 4241, 4245 (Mar. 6, 1968) (establishing the National Council on Indian Opportunity for the development and benefit of the Indian population); Special Message to the Congress on the Problems of the American Indian: "The Forgotten American", 1 PUB. PAPERS 335, 337 (Mar. 6, 1968) ("Indians must have a voice in making the plans and decisions in programs which are important to their daily life."); Letter from John F. Kennedy, U.S. Sen., to Oliver La Farge, President, Ass'n of Am. Indian Affs. (Oct. 28, 1960) (describing his position towards American Indians).

82. Williams v. Lee, 358 U.S. 217, 223 (1959) ("There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.").

83. Warren Trading Post, Co. v. Ariz. State Tax Comm'n, 380 U.S. 685, 690 (1965) ("Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities. And in compliance with its treaty obligations the Federal Government has provided for roads, education and other services needed by the Indians.").

84. *See* Colleen Shogan, *"We Shall Overcome" President Johnson and the 1965 Civil Rights Act*, WHITE HOUSE HIST. ASS'N (Apr. 8, 2021), https://www.whitehousehistory.org/we-shall-overcome-lbj-voting-rights? [https://perma.cc/8JCD-MYLW].

policy expressed in programs of self-help, self-development, self-determination."[85] President Richard Nixon formally ended the tribal termination era two years later.[86] In 1975, Congress officially adopted a policy of tribal self-determination.[87] Since then, every President and Congress has held fast to tribal self-determination.[88]

***B. Entering the Modern Era of Indian Country Taxation***

Economic development was fundamental to Congress's tribal self-determination policy.[89] With their sovereignty affirmed, tribes began seeking ways to improve the lives of their citizens.[90] Tribes asserted their treaty rights to fish,[91]

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85. Special Message to the Congress on the Problems of the American Indian: "The Forgotten American", *supra* note 81, at 336.

86. Special Message to the Congress on Indian Affairs, 1 PUB. PAPERS 564, 565 (July 8, 1970) ("The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.").

87. *See* Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 5301–5423 (2018)).

88. *See, e.g.*, Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000); Statement on Signing the Indian Self-Determination Assistance Act Amendments of 1988, 2 PUB. PAPERS 1284, 1284–85 (Oct. 5, 1988); Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, 1 PUB. PAPERS 662, 662–63 (June 14, 1991); Statement on Signing the Executive Order on Consultation and Coordination with Indian Tribal Governments, 3 PUB. PAPERS 2487, 2487 (Nov. 6, 2000); Memorandum on Government-to-Government Relationship With Tribal Governments, 2 PUB. PAPERS 2177, 2177 (Sep. 23, 2004); EXEC. OFF. OF THE PRES., 2016 WHITE HOUSE TRIBAL NATIONS CONF. PROGRESS REP., A RENEWED ERA OF FEDERAL-TRIBAL RELATIONS 5 (2017) https://obamawhitehouse.archives.gov/sites/default/files/docs/whncaa_report.pdf [https://perma.cc/3ZA8-DFVP]; Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 2021 DAILY COMP. PRES. DOC. NO. 00091 (Jan. 26, 2021); Alysa Landry, *Jimmy Carter: Signed ICWA into Law*, INDIAN COUNTRY TODAY, https://newsmaven.io/indiancountrytoday/archive/jimmy-carter-signed-icwainto-law-GtsQUN5tRkG1iNzMVHJP8g [https://perma.cc/ZGJ5-CUK9] (Sept. 13, 2018) ("During his presidential campaign in 1976, Carter's staff reached out to the National Congress of American Indians and the National Tribal Chairmen's Association. Carter met briefly with some leaders and his staff drafted a position paper that endorsed Indian self-determination policy, already in force.").

89. Statement on Indian Policy, 1 PUB. PAPERS 96, 98 (Jan. 24, 1983) ("It is the policy of this administration to encourage private involvement, both Indian and non-Indian, in tribal economic development.").

90. Srikrishnan et al., *supra* note 1 ("The development of tribal enterprises got a boost in the 1970s in part from federal programs, grants and loans.").

91. *See* Loraine Loomis, *Looking Back at the Fish Wars 50 Years Later*, NW. TREATY TRIBES (Nov. 3, 2020), https://nwtreatytribes.org/looking-back-at-the-fish-wars-50-years-later [https://perma.cc/4ZLG-T6SJ]; *Protests*, GREAT LAKES INDIAN FISH & WILDLIFE COMM'N, https://glifwc.org/TreatyRights/protest.html [https://perma.cc/B3B2-66F9] (last visited Oct. 1, 2024).

opened bingo halls,[92] and engaged in numerous business ventures.[93] States viewed tribes as competitors and attempted to curtail tribal sovereignty.[94] States were particularly fearful of tribes using low tax rates to create economic activity on their reservations.[95] Indeed, several tribes sold cigarettes on their reservations free from state taxes.[96] The ensuing litigation ushered in a new era of tribal tax policy.

*Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*[97] is the first modern Supreme Court case addressing state taxation of non-Indians on reservations. The case arose because Joseph Wheeler, a citizen of the Confederated Salish and Kootenai Tribes ("CSKT"), operated "smoke shops" on the CSKT Reservation, located in northwestern Montana.[98] Wheeler did not have a state license to sell cigarettes, and he was not collecting state taxes on his sales.[99] Accordingly, county law enforcement arrested Wheeler for violating state law.[100] The CSKT joined Wheeler in seeking injunctive relief against enforcement of the state tax and licensing laws on the CSKT Reservation.[101]

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92. *See History*, NAT'L INDIAN GAMING COMM'N, https://www.nigc.gov/commission/history [https://perma.cc/DBG9-MJ2T] (last visited Oct. 1, 2024).

93. *See, e.g.*, Dylan McDonald, *Open Stacks: Wendell Chino Innovative, Autocratic in Leading Mescalero Apache*, LAS CRUCES SUN NEWS (Nov. 13, 2021, 8:37 AM), https://www.lcsun-news.com/story/life/2021/11/13/open-stacks-wendell-chino-innovative-autocratic-leading-mescalero-apache/6385073001 [https://perma.cc/43UX-AJNR]; *Economic Development History*, MISS. BAND OF CHOCTAW INDIANS, https://www.choctaw.org/government/development/economicDevHistory.html [https://perma.cc/PHY6-FL64] (last visited Oct. 1, 2024).

94. Sarah Krakoff, *Mark the Plumber v. Tribal Empire, or Non-Indian Anxiety v. Tribal Sovereignty?: The Story of* Oliphant v. Suquamish Indian Tribe, *in* INDIAN LAW STORIES 263 (Carole Goldberg et al. eds., 2011).

95. *See* HILLARY DELONG ET AL., STATE REGULATION OF TRIBAL TOBACCO SALES: A HISTORICAL STATE-BY-STATE ANALYSIS, 2005-2015, at 10–11 (2016), https://tobacconomics.org/files/research/322/tobacconomics_tribal_template_FINAL-VERSION.pdf [https://perma.cc/U38M-MU3T] ("These lower prices [at off-reservation retailers] can attract buyers to tribal retailers, costing the state tax revenue it would otherwise be able to collect. This has been an issue for some time, and some states continue to see significant losses in tax revenue."); Thomas Kaplan, *In Tax Fight, Tribes Make, and Sell, Cigarettes*, CNBC (Feb. 23, 2012, 10:15 AM), https://www.cnbc.com/2012/02/23/in-tax-fight-tribes-make-and-sell-cigarettes.html [https://perma.cc/L77Y-RZLQ] ("The cigarettes . . . bring in millions of dollars a year to the tribe."); Paul Shukovsky, *New Tax Law All But Abolishes Indians' Lower Cigarette Prices*, SEATTLE P-I (July 11, 2001), https://www.seattlepi.com/seattlenews/article/new-tax-law-all-but-abolishes-indians-lower-1059587.php [https://perma.cc/29EY-L6NW] ("The state Department of Revenue estimates losing more than $60 million a year in cigarette taxes from native smoke-shop sales to non-Indians.").

96. *See, e.g.*, Washington v. Confederated Tribes of the Colville Indian Rsrv., 447 U.S. 134, 144–45 (1980) (discussing the "cigarette sales" by multiple tribes).

97. 425 U.S. 463 (1976).

98. *Id.* at 467.

99. *Id.*

100. *Id.* ("Deputy sheriffs arrested Wheeler and an Indian employee for failure to possess a cigarette retailer's license and for selling nontax-stamped cigarettes, both misdemeanors under Montana law.").

101. *Id.* at 467–68.

Based upon the long history of tribal sovereignty and the presumption against state authority on reservations,[102] the Court held the state could not require Wheeler to obtain a state license because states generally lack jurisdiction over Indians on reservations.[103] This history also led the Court to rule states cannot tax reservation transactions "by Indians to Indians."[104] However, the Court viewed sales involving non-Indians differently, noting Montana placed the legal incidence of the tax on the consumer.[105] The Court explained its reasoning by stating:

> Since nonpayment of the tax is a misdemeanor as to the retail purchaser, the competitive advantage which the Indian seller doing business on tribal land enjoys over all other cigarette retailers, within and without the reservation, is dependent on the extent to which the non-Indian purchaser is willing to flout His legal obligation to pay the tax. Without the simple expedient of having the retailer collect the sales tax from non-Indian purchasers, it is clear that wholesale violations of the law by the latter class will go virtually unchecked.[106]

Although CSKT argued that forcing it to collect the state tax violated its sovereignty,[107] the Court asserted that requiring Indian retailers to collect state taxes on sales to non-Indians "is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax."[108] The Court further claimed that forcing tribal retailers to collect taxes from non-Indian purchasers does not impact tribal self-government.[109] Thus, *Moe* authorized state taxation of reservation sales to non-Indians.[110] As one Supreme Court chronicle notes, *Moe* deviated from existing precedent and established a new framework "that in most cases [tribes] would lose."[111]

Tribal cigarette sales and state taxes reached the Supreme Court again four years later in *Washington v. Confederated Tribes of the Colville Indian*

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102. *Id.* at 477 ("We agree, and it would serve no purpose to retrace our analysis in this respect in *McClanahan* [*v. State Tax Comm'n of Ariz*], 411 U. S. [164, 173–79 (1973)].").

103. *Id.* at 480.

104. *Id.* at 481.

105. *Id.* at 482 ("That finding necessarily follows from the Montana statute, which provides that the cigarette tax 'shall be conclusively presumed to be (a) direct (tax) on the retail consumer precollected for the purpose of convenience and facility only.'").

106. *Id.*

107. *Id.* ("The Tribe asserts that to make the Indian retailer an 'involuntary agent' for collection of taxes owed by non-Indians is a 'gross interference with (its) freedom from state regulation,' and cites *Warren Trading Post v. Arizona Tax Comm'n*, 380 U. S. 685 (1965), as controlling.").

108. *Id.* at 483.

109. *Id.* ("We see nothing in this burden which frustrates tribal self-government.").

110. *Id.* ("We therefore agree with the District Court that to the extent that the 'smoke shops' sell to those upon whom the State has validly imposed a sales or excise tax with respect to the article sold, the State may require the Indian proprietor simply to add the tax to the sales price and thereby aid the State's collection and enforcement thereof.").

111. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 412 (1979).

*Reservation*.[112] In Washington State, multiple tribes were selling cigarettes free from state taxes on their reservations.[113] Like *Moe*, most of the tribal cigarettes were sold to non-Indians seeking a state tax exemption.[114] But unlike *Moe*, the tribes imposed their own tax and regulatory schemes on reservation cigarette sales.[115] Moreover, the Secretary of the Interior expressly authorized the tribal taxing ordinances, and the tribes used the federal funds to purchase cigarettes from suppliers located outside of Washington's borders.[116] The tribal cigarette sellers were also federally licensed Indian traders.[117] Despite the federal involvement in the tribal cigarette industry, Washington seized cigarettes bound for reservations.[118] The tribes filed suit seeking to enjoin the state from collecting taxes on reservation sales,[119] and Washington countered by arguing that tribes had no right to impose taxes on non-Indians.[120]

The Court held that both the tribes[121] and the state had the power to tax reservation commerce.[122] Despite acknowledging that tribes have always been recognized as having the power to regulate economic activity on their land,[123] the Court determined that tribal taxes—even supported by federal laws and policies—did not preempt Washington's tax.[124] The Court admitted that permitting tribes and the state to tax the same transaction created an economic problem for the tribes because the state tax plus the tribal tax made reservation purchases more expensive than off-reservation sales, where the purchaser is only subject to the state tax.[125] Though the Court admitted its holding put tribal retailers "at a competitive *disadvantage*,"[126] the Court asserted that this was fair because tribes were marketing

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112. *See* Washington v. Confederated Tribes of the Colville Indian Rsrv., 447 U.S. 134 (1980).

113. *Id.* at 139.

114. *Id.* at 145 ("Indian tobacco dealers make a large majority of their sales to non-Indians—residents of nearby communities who journey to the reservation especially to take advantage of the claimed tribal exemption from the state cigarette and sales taxes.").

115. *Id.* at 144 ("Each Tribe has enacted ordinances pursuant to which it has authorized one or more on-reservation tobacco outlets.").

116. *Id.*

117. *Id.*

118. *Id.* at 142 ("The State has sought to enforce its cigarette tax by seizing as contraband unstamped cigarettes bound for various tribal reservations.").

119. *Id.* at 139–40.

120. *Id.* at 152 ("At the outset, the State argues that the Colville, Makah, and Lummi Tribes have no power to impose their cigarette taxes on nontribal purchasers.").

121. *Id.* ("The widely held understanding within the Federal Government has always been that federal law to date has not worked a divestiture of Indian taxing power.").

122. *Id.* at 156–59.

123. *Id.* at 152.

124. *Id.* at 155 ("The federal statutes cited to us, even when given the broadest reading to which they are fairly susceptible, cannot be said to pre-empt Washington's sales and cigarette taxes.").

125. *Id.* at 154 ("If the State is permitted to impose its taxes, the Tribes will no longer enjoy any competitive advantage vis-á-vis businesses in surrounding areas. Indeed, because the Tribes themselves impose a tax on the transaction, if the state tax is also collected the price charged will necessarily be higher and the Tribes will be placed at a competitive *disadvantage* as compared to businesses elsewhere.").

126. *Id.*

an exemption from state taxes.[127] The Court claimed the state tax did not undermine tribes' right to self-govern because no value was added to the cigarettes on the reservations.[128]

After upholding the Washington tax, the Court addressed other issues related to the state cigarette tax. The Court held that states can tax tribal cigarette sales to nonmember Indians.[129] For example, Washington has the power to tax sales to Cherokee purchasers on the Lummi Reservation.[130] The Court claimed the state was justified in taxing nonmember Indians because nonmembers cannot vote in tribal elections and are the legal equivalent of non-Indians.[131] With the ability to tax non-Indians and nonmember Indians, the Court affirmed *Moe*'s holding that tribes can be compelled to collect state taxes.[132] The Court described the state regulation imposed on tribal retailers as "[t]he simple collection burden."[133] This allegedly nominal task mandates reservation retailers to undertake significant administrative obligations:

> The operator must record the number and dollar volume of taxable sales to nonmembers of the Tribe. With respect to nontaxable sales, the operator must record and retain for state inspection the names of all Indian purchasers, their tribal affiliations, the Indian reservations within which sales are made, and the dollar amount and dates of sales. In addition, unless the Indian purchaser is personally known to the operator he must present a tribal identification card.[134]

If the tribes did not pay state taxes, the Court authorized Washington to seize cigarettes bound for the reservations.[135] Washington and the Supreme Court acknowledged that "no tax is due while the cigarettes are in transit."[136] Nonetheless,

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127. *Id.* at 155 ("What the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation.").

128. *Id.* at 156–57.

129. *Id.* at 161.

130. *Id.* at 160 ("Federal statutes, even given the broadest reading to which they are reasonably susceptible, cannot be said to pre-empt Washington's power to impose its taxes on Indians not members of the Tribe.").

131. *Id.* at 161 ("For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation. There is no evidence that nonmembers have a say in tribal affairs or significantly share in tribal disbursements. We find, therefore, that the State's interest in taxing these purchasers outweighs any tribal interest that may exist in preventing the State from imposing its taxes.").

132. *Id.* at 159.

133. *Id.*

134. *Id.*

135. *Id.* at 161 ("We find that Washington's interest in enforcing its valid taxes is sufficient to justify these seizures.").

136. *Id.* ("The Tribes contest this power, noting that because sales by wholesalers to the tribal businesses are concededly exempt from state taxation, no state tax is due while the cigarettes are in transit.").

the Court asserted that this was better for tribes because off-reservation seizures of tribal goods did not impact tribal sovereignty.[137]

Two weeks after *Colville*, the Supreme Court issued an opinion that still guides tribal–state taxation—*White Mountain Apache Tribe v. Bracker*.[138] No cigarettes were involved this time. Instead, the case arose from Arizona's attempt to tax a private company, Pinetop, hired to perform timber operations on the Fort Apache Reservation, home of the White Mountain Apache Tribe ("White Mountain").[139] White Mountain formed a federally chartered corporation to harvest and process the timber on its reservation in 1964.[140] The tribe's timber operation provided over 90% of the tribe's total profits.[141] Although the tribe performed much of the work with its own citizens,[142] it hired contractors, including Pinetop, for certain tasks.[143] Arizona attempted to impose its motor carrier license and fuel taxes on Pinetop because Arizona claimed the company used state roads within the reservation.[144] Arizona also alleged that it could tax non-Indians engaged in commerce on reservations.[145] Pinetop filed suit, arguing that the tax was preempted for work conducted on the reservation, and White Mountain intervened on its behalf.[146]

The Supreme Court ruled in favor of White Mountain.[147] Rather than providing a clear rule, the Court crafted the *Bracker* balancing test that "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."[148] The Court emphasized that "the Federal Government has undertaken comprehensive regulation of the harvesting and sale of tribal timber,"[149] and "the Bureau of Indian Affairs exercises literally daily

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137. *Id.* at 162 ("By seizing cigarettes en route to the reservation, the State polices against wholesale evasion of its own valid taxes without unnecessarily intruding on core tribal interests.").

138. 448 U.S. 136 (1980).

139. *Id.* at 139–40.

140. *Id.* at 139 ("Acting under the authority of 25 C.F.R. § 141.6 (1979) and the tribal constitution, and with the specific approval of the Secretary of the Interior, the Tribe in 1964 organized the Fort Apache Timber Co. (FATCO), a tribal enterprise that manages, harvests, processes, and sells timber.").

141. *Id.* at 138 ("Of these enterprises, timber operations have proved by far the most important, accounting for over 90% of the Tribe's total annual profits.").

142. *Id.* at 139 ("[The tribal timber company] employs about 300 tribal members.").

143. *Id.* ("FATCO has itself contracted with six logging companies, including Pinetop, which perform certain operations that FATCO could not carry out as economically on its own.").

144. *Id.* at 139–40.

145. *Id.* at 150–51 ("Respondents' argument is reduced to a claim that they may assess taxes on non-Indians engaged in commerce on the reservation whenever there is no express congressional statement to the contrary.").

146. *Id.* at 140.

147. *Id.* at 138 ("We hold that the taxes are pre-empted by federal law, and we therefore reverse.").

148. *Id.* at 145.

149. *Id.* at 151.

supervision over the harvesting and management of tribal timber."[150] Furthermore, the Court pointed out that the reservation's roads were built, maintained, and governed by the tribe and the federal government.[151] Given the magnitude of federal involvement, the state taxation would interfere with the federal government's policy objectives on the reservation.[152] Moreover, the state tax would cut into tribal profits. By depleting tribal profits, the state tax infringed upon the tribe's interest in generating revenue and hindered the tribe's ability to fulfill the purpose of the federally chartered tribal corporation.[153] Even though the company was non-Indian-owned, the Court said the state had no interest in levying the tax because the state provided no service to justify the tax.[154] The Court did not raise this point, but the timber was grown on the reservation, meaning White Mountain was creating value on its reservation, thereby distinguishing it from the cigarette cases.[155] Thus, the state tax was preempted.

The Supreme Court was presented with an opportunity to apply its balancing test soon after *Bracker*. In 1968, New Mexico closed a school located near the Navajo Reservation's border that served the Ramah Navajo Chapter.[156] There were no other schools nearby, so Ramah residents were presented with a choice: attend a distant boarding school or forego education.[157] Ramah responded to this dilemma by establishing a school board.[158] Congress provided funds for the construction of a school for the Ramah Navajo, and the Bureau of Indian Affairs was heavily involved in the school's construction.[159] The school board hired a non-Indian construction company to build the school.[160] New Mexico sought to levy a gross receipts tax on the non-Indian company,[161] and the Navajo Nation and non-Indian company challenged the tax.[162]

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150. *Id.* at 147.

151. *Id.* at 150 ("The roads at issue have been built, maintained, and policed exclusively by the Federal Government, the Tribe, and its contractors.").

152. *Id.* at 148 ("There is no room for these taxes in the comprehensive federal regulatory scheme. In a variety of ways, the assessment of state taxes would obstruct federal policies."); *id.* at 149 ("The assessment of state taxes would throw additional factors into the federal calculus, reducing tribal revenues and diminishing the profitability of the enterprise for potential contractors.").

153. *Id.* at 149–50.

154. *Id.* at 150 ("They refer to a general desire to raise revenue, but we are unable to discern a responsibility or service that justifies the assertion of taxes imposed for on-reservation operations conducted solely on tribal and Bureau of Indians Affairs roads.").

155. *See* Washington v. Confederated Tribes of the Colville Indian Rsrv., 447 U.S. 134, 156–57 (1980).

156. Ramah Navajo Sch. Bd. Inc. v. Bureau of Revenue of N.M., 458 U.S. 832, 834 (1982).

157. *Id.* ("Because there were no other public high schools reasonably close to the reservation, the Ramah Navajo children were forced either to abandon their high school education or to attend federal Indian boarding schools far from the reservation.").

158. *Id.*

159. *Id.* at 835.

160. *Id.*

161. *Id.* at 836.

162. *Id.*

The Supreme Court declared, "This case is indistinguishable in all relevant respects from *White Mountain*;"[163] accordingly, the state tax was invalid. Particularly pertinent, the federal government was heavily involved in constructing and financing the school.[164] Federal policies from early treaties to the present day expressed a strong federal interest in supporting Indian education.[165] Furthermore, the federal government had enacted numerous statutes to support tribal self-government since the 1970s.[166] Contrary to the federal government, New Mexico did not allege its tax was used to fund any service on the reservation.[167] Rather, New Mexico claimed the services it provided off-reservation justified imposing the tax on the non-Indian contractor.[168] The Court declared that off-reservation services were "not a legitimate justification" for on-reservation taxes.[169] For off-reservation services, the Court opined that off-reservation tax revenues should cover the state's costs.[170] The Court did not discuss the tribal interests at play, though they presumably aligned with the federal interests. Absent any state interest other than a desire for revenue, the Court invalidated New Mexico's tax.

### *C. Unbalancing* **Bracker**

The battle over whether states can tax tribal commerce came to a head in *Cotton Petroleum Corp. v. New Mexico*.[171] The Jicarilla Apache Reservation contains rich oil and gas deposits on federally owned tribal trust land.[172] In 1976, Cotton Petroleum Corporation ("Cotton") entered an oil and gas lease on the Jicarilla Apache Reservation, with tribal and federal approval.[173] The lease subjected Cotton to tribal oil and gas taxes of 6%.[174] Because the Jicarilla Apache Reservation is located within its borders, New Mexico sought to impose its 8% oil production tax

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163. *Id.* at 839 ("This case is indistinguishable in all relevant respects from *White Mountain*.").

164. *Id.* ("Federal regulation of the construction and financing of Indian educational institutions is both comprehensive and pervasive.").

165. *Id.* at 839–40 ("The Federal Government's concern with the education of Indian children can be traced back to the first treaties between the United States and the Navajo Tribe. Since that time, Congress has enacted numerous statutes empowering the BIA to provide for Indian education both on and off the reservation.").

166. *Id.* at 840 ("[I]n the early 1970's the federal policy shifted toward encouraging the development of Indian-controlled institutions on the reservation.").

167. *Id.* at 843 ("In this case, the State does not seek to assess its tax in return for the governmental functions it provides to those who must bear the burden of paying this tax.").

168. *Id.* at 843–44 ("The only arguably specific interest advanced by the State is that it provides services to *Lembke* for its activities *off the reservation*.").

169. *Id.* at 844 ("This interest, however, is not a legitimate justification for a tax whose ultimate burden falls on the tribal organization.").

170. *Id.* at 844 n.9 ("Presumably, the state tax revenues derived from Lembke's off-reservation business activities are adequate to reimburse the State for the services it provides to Lembke.").

171. 490 U.S. 163 (1989).

172. *Id.* at 167.

173. *Id.* at 168.

174. *Id.* ("In addition, Cotton pays the Tribe's oil and gas severance and privilege taxes, which amount to approximately 6 percent of the value of its production.").

on Cotton.[175] The state tax plus tribal tax meant Cotton was paying a total tax rate of 14%.[176]

Cotton filed suit in New Mexico state court challenging the New Mexico levy.[177] Though Cotton invoked four U.S. constitutional provisions,[178] its argument ultimately hinged on the imbalance between the amount of the New Mexico tax and the value of the services New Mexico provided.[179] From 1981 to 1985, Cotton paid New Mexico $2,293,953 in taxes for its reservation production but received only $89,384 in services from New Mexico.[180] The Jicarilla Apache Tribe filed an amicus brief arguing the state taxes interfered with its ability to collect tax revenue and also that New Mexico did not provide services commensurate with the taxes it collected from the reservation.[181] Indeed, evidence suggested that New Mexico collected $47,483,306 from oil producers on the Jicarilla Apache Reservation between 1981 and 1985 but only provided $10,704,748 in services to the reservation during the period.[182]

The New Mexico state district court upheld the New Mexico tax.[183] The court determined, "New Mexico provides substantial services to both the Jicarilla Tribe and Cotton."[184] In particular, the court noted that New Mexico regulated oil well spacing on and off the reservation.[185] The court emphasized that the tax was imposed on Cotton—a non-Indian company—rather than on the tribe.[186] Additionally, the court stated, "The theory of public finance does not require expenditures equal to revenues."[187] The court also rejected the tribe's argument that the state tax interfered with federal policies supporting tribal self-determination and economic development.[188] Interestingly, the court asserted that the state tax had no impact on the tribe's ability to levy taxes nor had the state tax adversely affected oil and gas production on the reservation.[189] Finding the state tax had no negative consequences on the tribe, the state court held that the state tax was not preempted.[190]

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175. *Id.*
176. *Id.* at 169.
177. *Id.* at 170.
178. *Id.* ("In 1982, Cotton paid its state taxes under protest and then brought an action in the District Court for Santa Fe County challenging the taxes under the Indian Commerce, Interstate Commerce, Due Process, and Supremacy Clauses of the Federal Constitution.").
179. *Id.* ("Relying on the *Merrion* footnote, Cotton contended that state taxes imposed on reservation activity are only valid if related to actual expenditures by the State in relation to the activity being taxed.").
180. *Id.* at 170 n.6.
181. *Id.* at 170.
182. *Id.* at 170 n.6.
183. *Id.* at 171.
184. *Id.*
185. *Id.* at 171 n.7.
186. *Id.* at 171.
187. *Id.*
188. *Id.*
189. *Id.* at 171–72.
190. *Id.* at 172.

The court rejected the tribe and Cotton's constitutional arguments too.[191] The New Mexico Court of Appeals affirmed the ruling,[192] and the New Mexico Supreme Court granted, but later quashed, certiorari.[193]

The U.S. Supreme Court granted certiorari and ruled in favor of New Mexico. At the outset, the Court rejected Cotton's argument that the Indian Mineral Leasing Act of 1938 ("IMLA") preempted state taxation of tribal resource development.[194] Cotton next argued that the New Mexico levy was invalid under the Court's recent decisions,[195] and the Court countered by stating its *Bracker* balancing test was "flexible."[196] The Court emphasized that its prior decisions barring state taxes focused on the extensive federal regulation of the activities involved and the state's provision of zero services related to the tax.[197] Contrarily, New Mexico provided some services to Cotton.[198] While the Court admitted that "federal and tribal regulations in this case are extensive," even the slightest state involvement in oil production distinguished *Cotton Petroleum* from its predecessors.[199] Similarly, the Court emphasized that the New Mexico tax fell upon non-Indian oil companies rather than the tribe.[200] The Court acknowledged that the New Mexico tax was grossly disproportionate to the value of services the state provided Cotton or the reservation.[201] Nevertheless, the Court held there is no constitutional requirement that a tax bear a connection to the amount of services rendered by the government.[202]

Although the Court upheld the New Mexico tax, the Court ceded, "It is, of course, reasonable to infer that the New Mexico taxes have at least a marginal effect

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191. *Id.*

192. *Id.*

193. *Id.* at 173.

194. *Id.* at 177 ("Most significantly, Cotton contends that the 1938 Act exhibits a strong federal interest in guaranteeing Indian tribes the maximum return on their oil and gas leases.").

195. *Id.* at 183–84 ("Cotton nonetheless maintains that our decisions in *White Mountain Apache Tribe v. Bracker*, 448 U. S. 136 (1980), and *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U. S. 832 (1982), compel the conclusion that the New Mexico taxes are pre-empted by federal law.").

196. *Id.* at 184 ("In pressing this argument, Cotton ignores the admonition included in both of those decisions that the relevant pre-emption test is a flexible one sensitive to the particular state, federal, and tribal interests involved.").

197. *Id.* at 184–85 (summarizing *White Mountain Apache Tribe* and *Ramah Navajo School Board)*.

198. *Id.* at 185 ("Indeed, Cotton concedes that from 1981 through 1985 New Mexico provided its operations with services costing $89,384.").

199. *Id.* at 186.

200. *Id.* at 185 ("The present case is also unlike *Bracker* and *Ramah Navajo School Bd.,* in that the District Court found that '[n]o economic burden falls on the tribe by virtue of the state taxes.'"); *id.* at 187 n.18 ("It is important to keep in mind that the primary burden of the state taxation falls on the non-Indian taxpayers.").

201. *Id.* at 189 ("Cotton's most persuasive argument is based on the evidence that tax payments by reservation lessees far exceed the value of services provided by the State to the lessees, or more generally, to the reservation as a whole.").

202. *Id.* at 190 ("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.").

on the demand for on-reservation leases, the value to the Tribe of those leases, and the ability of the Tribe to increase its tax rate."[203] The Court also stipulated, "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."[204] However, the Court claimed the impacts of the state tax were "simply too indirect and insubstantial" to support the tribal preemption claim.[205] Indeed, the Court asserted, "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."[206] Despite the Court's statement, oil companies submitted an amicus brief explaining how the combined state and tribal tax would make operating in Indian country less attractive.[207]

Justice Blackmun, joined by Justices Marshall and Brennan, dissented. The dissent explained that when the IMLA was drafted, states clearly had no authority to tax tribal commerce absent congressional consent.[208] Moreover, the dissent alleged the majority warped the *Bracker* balancing test.[209] The dissent explained that state law cannot apply in Indian country if the state law interferes with tribal self-government or if the federal government comprehensively regulates the activity.[210] Here, the federal government and the tribe thoroughly regulated reservation oil production.[211] Hence, permitting New Mexico to tax the tribal oil and gas production based upon its regulation of well spacing made little sense to the dissent[212] because the federal government had to approve the application of state law to the tribal

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203. *Id.* at 186–87.

204. *Id.* at 191.

205. *Id.* at 187.

206. *Id.* at 191.

207. Brief of Texaco Inc. et al. as Amici Curiae in Support of Appellants at 4, *Cotton Petrol.*, 490 U.S. 163 (No. 87-1327) ("[T]he combined tribal and state taxes will prevent the development of tribal resources that otherwise would be sold to consumers nationwide.").

208. *Cotton Petrol.*, 490 U.S. at 198 (Blackmun, J., dissenting) ("Thus, although the majority is technically correct that the 1938 Act did not become law until after the announcement of this Court's decision in *Mountain Producers*, the legislation was formulated, considered by the House and Senate Committees, referred out of the Committees without amendment, and passed by the Senate, all before *Mountain Producers* on March 7, 1938, changed the law of intergovernmental tax immunity. Up until that point, the clear meaning of the statute, as our decision in *Montana* makes clear, is that the State lacked power to impose the tax at issue in this case.").

209. *Id.* at 203–04. ("The majority concludes otherwise because it distorts the legal standard it purports to apply.").

210. *Id.* at 204 ("The exercise of state authority may be impermissible solely on the ground that the state intervention would interfere with 'the right of reservation Indians to make their own laws and be ruled by them.' Alternatively, state law may be pre-empted by the existence of a comprehensive federal regulatory scheme governing the subject matter." (citations omitted)).

211. *Id.* at 206 ("The majority acknowledges that federal and tribal regulations in this case are extensive.").

212. *Id.*

operation.[213] Aside from New Mexico's minimal involvement, the dissent believed the state taxes were disconnected from any value the state added to Cotton or the tribe.[214] Justice Blackmun pointed out that the infrastructure supporting oil production on the Jicarilla Apache Reservation was provided by the tribe and the federal government.[215] During the tax period at issue, the dissent explained that New Mexico expenditures accounted for less than 5% of all services provided to facilitate oil production on the Jicarilla Apache Reservation.[216] Accordingly, Justice Blackmun thought the majority's opinion allowed the state to levy a tax on tribal commerce so long as the state provided any non-zero number of services on the reservation at issue.[217] The dissent believed the majority's position on state taxation was at odds with the federal government's tribal self-determination policy.[218]

In addition to criticizing the majority for distorting the *Bracker* balancing test and federal policy, the dissent concluded that the New Mexico levy would have an obvious adverse impact on the Jicarilla Apache Tribe's oil revenues and government finances.[219] The dissent used basic math to explain that the state tax plus the tribal tax meant on-reservation oil production was 75% more expensive than off-reservation production.[220] If drilling became more expensive, Justice Blackmun thought this would deter businesses from investing in new oil wells on reservations.[221] Moreover, tribal tax revenue has been widely acknowledged as an

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213. *Id.* at 206 n.9 ("The manner in which a State exercises a regulatory role in the area of well spacing indeed underscores the comprehensiveness of *federal* law in this area: state law applies not of its own force, but only if its application is approved by the Bureau of Land Management.").

214. *Id.* at 208 ("The exclusion of all sense of proportion has led to a result that is antithetical to the concerns that animate our Indian pre-emption jurisprudence.").

215. *Id.* at 207 ("It is clear on this record, however, that the infrastructure which supports oil and gas production on the Jicarilla Apache Reservation is provided almost completely by the federal and tribal governments rather than by the State.").

216. *Id.* at 207 n.11 ("The distribution of responsibility is even clearly reflected in the relevant oil-and-gas-related expenditures during the 5-year period at issue in this case: federal expenditures were $1,206,800; tribal expenditures were $736,358; the State spent, at most, $89,384.").

217. *Id.* at 204 ("Under the majority's approach, there is no pre-emption unless the States are *entirely* excluded from a sphere of activity and provide *no* services to the Indians or to the lessees they seek to tax.").

218. *Id.* at 208 ("Under the majority's analysis, insignificant state expenditures, reflecting minimal state interests, are sufficient to support state interference with significant federal and tribal interests.").

219. *Id.* ("Finally, the majority sorely underestimates the degree to which state taxation of oil and gas production adversely affects the interests of the Jicarilla Apache.").

220. *Id.* ("Assuming that the Tribe continues to tax oil and gas production at present levels, on-reservation taxes will remain 75% higher (14% as opposed to 8% of gross value) than off-reservation taxes within the State.").

221. *Id.* at 208–09 ("Federal and tribal interests legitimately include long-term planning for development of lease revenues on new lands, where there is greater economic risk, and a greater probability that difference in tax rates will have an adverse effect on a producer's willingness to drill new wells and on the competitiveness of Jicarilla leases." (citation omitted)).

integral component of tribal self-government,[222] and the dissent noted that state taxes infringe upon tribes' ability to determine their own tax rates.[223] By preventing tribes from controlling their own tax rates, the dissent believed state taxes prevented tribes from exercising their right to self-govern.[224] The Court had recently invalidated state taxes of 2% or less as infringing upon a tribe's right to self-govern, so the dissent was puzzled by how New Mexico's 8% oil and gas levy did not violate the federal government's tribal self-determination policy.[225] Justice Blackmun was particularly troubled by the state tax because oil and gas were responsible for 90% of the Jicarilla Apache Tribe's income,[226] and the tribe actually generated value on the reservation.[227] Therefore, the tribe was not marketing a tax exemption but the resources located within its reservation.

*Cotton Petroleum* marked a paradigm shift in state taxation of tribal commerce.[228] Prior to the case, states presumptively lacked the ability to tax tribal economic activity absent congressional intent.[229] Following *Cotton Petroleum*,

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222. *Id.* at 209 ("Tribal taxation has been widely perceived as necessary to protect Indian interests.").

223. *Id.* ("Furthermore, where, as here, the Tribe has made the decision to tax oil and gas producers, the long-term impact of state taxation on the Tribe's freedom of action in the sphere of taxation must also be considered.").

224. *Id.* at 210 ("The market can bear only so much taxation, and it is inevitable that a point will be reached at which the State's taxes will impose a ceiling on tribal tax revenues.").

225. *Id.* at 211 ("That the tax burden was held sufficient to support a finding of pre-emption in *White Mountain Apache* and *Warren Trading Post* undermines the majority's position here.").

226. *Id.* at 209 ("In this case, too, it is undisputed that oil and gas production *is* the Jicarilla Apache economy—a common pattern in reservations with substantial oil and gas reserves . . . [because] oil and gas royalties account for 90% of tribal income." (citations omitted)).

227. *Id.* at 210 n.14 ("We observed in *Colville* that the Tribe was basically importing goods and marketing its tax immunity. That is not so here. Indeed, our decision in *Colville* expressly left open the possibility that 'the Tribes themselves could perhaps pre-empt state taxation through the exercise of properly delegated federal power to do so.'" (citation omitted)).

228. *See* Dominic A. Azzopardi, *Dual Taxation in Indian Country: The Struggle to Correct* Cotton Petroleum, 67 WAYNE L. REV. 311, 325 (2022) ("As will be discussed throughout this Article, *Cotton Petroleum* rewrites the precedent and permanently weakens the litigating position of tribes on the topic of dual taxation, allowing more pervasive state taxation regimes to be found permissible."); Kristina Bogardus, *Court Picks New Test in* Cotton Petroleum, 30 NAT. RES. J. 919, 920 (1990) ("By holding that the taxes are not pre-empted by federal law, the Supreme Court has rejected its own historical approach to Indian pre-emption cases, and has reversed the presumption which operates when states try to assert authority over Indian tribes."); Erin Marie Erhardt, *States Versus Tribes: The Problem of Multiple Taxation of Non-Indian Oil and Gas Leases on Indian Reservations*, 38 AM. INDIAN L. REV. 533, 539 (2014) ("*Cotton* represents a major turning point for state taxation of non-Indians on Indian lands.").

229. Bogardus, *supra* note 228, at 925 ("However, the majority failed to apply the presumption traditionally applied in Indian law cases, that is, a presumption of federal pre-emption absent clear congressional intent to allow state regulatory activity.").

states are assumed to have the authority to tax Indian country business operations.[230] The standard imposed by the Court in *Cotton Petroleum* renders it exceedingly difficult for tribes to escape state taxing authority.[231]

## II. THE *COTTON*-INFUSED *BRACKER* ANALYSIS

Following *Cotton Petroleum*, tribal–state tax disputes have overwhelmingly gone in states' favor.[232] In 1998, the Crow Tribe argued that Montana's coal tax prevented the tribe from collecting "its fair share of the economic rent,"[233] but the Supreme Court relied on *Cotton Petroleum* to uphold the state tax.[234] Federal Indian trader laws, according to the Supreme Court in 1965, completely governed reservation commerce and preempted state taxation of licensed Indian traders.[235] The Court changed its tune post-*Cotton Petroleum* and balanced away the importance of federal Indian trader laws[236] to uphold state duties on federally licensed Indian traders in 1994.[237] And although Kansas exempted several categories of sales from its fuel tax,[238] the Court upheld a Kansas levy that placed an economic

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230. *Id.* at 926 ("Instead the Court presumed the applicability of state taxes in the absence of express congressional intent barring taxation.").

231. *Id.* at 927 ("The Court has now established a standard which will be extremely difficult to meet."); Azzopardi, *supra* note 228, at 330 ("After *Cotton Petroleum*, it became substantially harder for tribal authorities to argue that a state tax had been federally preempted. *Cotton Petroleum*, for this reason, has been called 'the near-death of preemption' in the context of taxation cases on reservations." (citation omitted)).

232. The notable exception is *Oklahoma Tax Commission v. Sac & Fox Nation*, 508 U.S. 114, 126 (1993) ("If the tribal members do live in Indian country, our cases require the court to analyze the relevant treaties and federal statutes against the backdrop of Indian sovereignty. Unless Congress expressly authorized tax jurisdiction in Indian country, the *McClanahan* presumption counsels against finding such jurisdiction.").

233. Montana v. Crow Tribe of Indians, 523 U.S. 696, 717 (1998) ("Instead, the Tribe's disgorgement claim rested on the coal 'actually produced and sold'; by taxing that coal, counsel maintained, Montana 'deprived [the Tribe] of its fair share of the economic rent.'" (alteration in original)).

234. *Id.* at 716 ("Here, as *Cotton Petroleum* makes plain, neither the State nor the Tribe enjoys authority to tax to the total exclusion of the other.").

235. *See* Warren Trading Post Co., v. Ariz. State Tax Comm'n, 380 U.S. 685, 689 (1965) ("Acting under authority of this statute and one added in 1901,the Commissioner has promulgated detailed regulations prescribing in the most minute fashion who may qualify to be a trader and how he shall be licensed, penalties for acting as a trader without a license; conditions under which government employees may trade with Indians; articles that cannot be sold to Indians; and conduct forbidden on a licensed trader's premises.").

236. Dep't of Tax'n & Fin. of N.Y. v. Milhelm Attea & Bros., 512 U.S. 61, 73 (1994).

237. *Id.* at 75 ("Although broad language in our opinion in *Warren Trading Post* lends support to a contrary conclusion, we now hold that Indian traders are not wholly immune from state regulation that is reasonably necessary to the assessment or collection of lawful state taxes.").

238. Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 116 (2005) (Ginsburg, J., dissenting) ("The Kansas fuel tax at issue is imposed on distributors, passed on to retailers, and ultimately paid by gas station customers. Out-of-state sales are exempt, as are sales to other distributors, the United States, and U.S. Government contractors. Fuel lost or

burden on tribal retailers in 2005.[239] Even when tribes prevailed at the Supreme Court, the Court advised states on how to revise their taxes in order to legally tax tribal commerce.[240] Tribes have been equally unsuccessful in lower courts.[241]

*Cotton Petroleum* places state interests on a pedestal. While courts denominate the tribal interest in revenue generation as merely financial,[242] courts classify states' hunger for revenue as a permission slip to tax tribal commerce.[243] In fact, courts have stretched *Cotton Petroleum* to the point that states no longer even need to claim they provide a service on reservation in order to tax tribal commerce.[244] Courts assert that states have an interest in uniformly applying their

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destroyed, and thus not sold, is also exempt. But no statutory exception attends sales to Indian tribes or their members.").

239. *Id.* at 114 (majority opinion) ("The Nation merely seeks to increase those revenues by purchasing untaxed fuel. But the Nation cannot invalidate the Kansas tax by complaining about a decrease in revenues.").

240. *See* Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 460 (1995) ("And if a State is unable to enforce a tax because the legal incidence of the impost is on Indians or Indian tribes, the State generally is free to amend its law to shift the tax's legal incidence."); *Milhelm Attea & Bros.*, 512 U.S. at 72 ("[W]e explained that alternative remedies existed for state tax collectors, such as damages actions against individual tribal officers or agreements with the tribes."); Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 514 (1991) (advising states on how to circumvent tribal sovereign immunity in order to collect taxes on tribes).

241. *See, e.g.*, Flandreau Santee Sioux Tribe v. Houdyshell, 50 F.4th 662 (8th Cir. 2022); Ute Mountain Ute Tribe v. Rodriguez, 660 F.3d 1177 (10th Cir. 2011); Yavapai-Prescott Indian Tribe v. Scott, 117 F.3d 1107 (9th Cir. 1997); Salt River Pima-Maricopa Indian Cmty. v. Arizona, 50 F.3d 734 (9th Cir. 1995); Gila River Indian Cmty. v. Waddell, 967 F.2d 1404 (9th Cir. 1992).

242. *See* Tulalip Tribes v. Washington, 349 F. Supp. 3d 1046, 1060 (W.D. Wash. 2018) ("The primary interest asserted by both the State and Snohomish County is an interest in raising revenue, which courts have routinely found to be 'a legitimate state interest.'" (citation omitted)); Barona Band of Mission Indians v. Yee, 528 F.3d 1184, 1192 (9th Cir. 2008) ("As with the related tribal interest, the federal government's interest in Indian economic vitality does not alone defeat an otherwise legitimate state tax.").

243. *See Flandreau Santee Sioux Tribe*, 50 F.4th at 675 ("Next, as to the State's interest in raising revenue for the general revenue fund, the parties acknowledge that raising revenue is a legitimate state interest."); Mashantucket Pequot Tribe v. Town of Ledyard, 722 F.3d 457, 475 (2d Cir. 2013) ("In this case, the Town has a cognizable economic interest in imposing the tax."); *Barona Band of Mission Indians*, 528 F.3d at 1192–93 ("Raising revenue to provide general government services is a legitimate state interest.").

244. *See, e.g.*, *Flandreau Santee Sioux Tribe*, 50 F.4th at 675 ("We do not disagree with the district court that there was no clear nexus between the taxed activity and the government functions provided. But we disagree with the district court that the State provided nothing of value in return for the tax because the State provided generally available benefits to its residents, which includes tribal members and employees of Henry Carlson Company."); Keweenaw Bay Indian Cmty. v. Khouri, 549 F. Supp. 3d 662, 691 (W.D. Mich. 2021) ("The services provided by the revenue generated by the sales tax is not directly connected to the activity subject to the tax."); *Ute Mountain Ute Tribe*, 660 F.3d at 1199 ("However, the more important state service—and the one that primarily justifies the New Mexico taxes at issue—is the off-reservation infrastructure used to transport the oil and gas after it is severed.").

laws within their borders[245] and aver that tribes benefit generally from the availability of services states provide off-reservation.[246] Moreover, courts contend that states have an interest in preventing tax rate competition with tribes.[247] If states cannot impose taxes in Indian country, courts fear tribes will become tax havens.[248]

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245. *See, e.g.*, *Flandreau Santee Sioux Tribe*, 50 F.4th at 675–76 ("[A]s to the State's interest in uniformly applying its tax laws across the State, the district court concluded that this interest did not weigh against preemption because evidence of differing tax agreements between the State and various tribes demonstrated that the excise tax was not applied uniformly across those tribes that requested tax exemptions. . . . The district court's failure to recognize this as a significant state interest was thus in error."); *Tulalip Tribes*, 349 F. Supp. 3d at 1062 ("[T]he State and County have a substantial interest in enforcing generally applicable taxes within their borders"); *Mashantucket Pequot Tribe*, 722 F.3d at 476 ("The Tribe's sovereign interest in being able to exercise sole taxing authority over possession of property is insufficient to outweigh the State's interest in the uniform application of its generally-applicable tax, particularly where, as here, there is room for both State and Tribal taxation of the same activity.").

246. *See, e.g.*, *Flandreau Santee Sioux Tribe*, 50 F.4th at 674–75; Agua Caliente Band of Cahuilla Indians v. Riverside Cnty., No. ED CV 14-0007 DMG (DTBx), 2017 WL 4533698, at *15 (C.D. Cal. June 15, 2017) ("As the Court has explained, the state services provided on and *around the Reservation* directly support lessees' enjoyment of Trust Lands—the activity being taxed." (emphasis added)), *aff'd*, 749 F. App'x 650 (9th Cir. 2019); Srikrishnan et al., *supra* note 1 ("In lawsuits about the matter, many states argue that they should be collecting tax revenue from economic activity on tribal lands because they provide services off-reservation—such as highways—that the customers and companies involved in on-reservation businesses need.").

247. *See, e.g.*, *Keweenaw Bay Indian Cmty.*, 549 F. Supp. 3d at 704 ("The value marketed to non-Indians is the avoidance of state taxes."); *Mashantucket Pequot Tribe*, 722 F.3d at 476 ("Finally, if there is evidence of arbitrage or Tribal efforts to structure deals so as to avoid the State tax, the State's interests are stronger."); Muscogee (Creek) Nation v. Pruitt, 669 F.3d 1159, 1175 n.8 (10th Cir. 2012) ("The Supreme Court has already conclusively addressed the validity of taxes nearly identical to the excise tax here, and found that tribes do not have an interest in marketing an exemption from valid state taxes."); *Barona Band of Mission Indians*, 528 F.3d at 1186 ("Because the Tribe, as part of its highly lucrative gambling enterprise, merely marketed a sales tax exemption to non-Indians as part of a calculated business strategy, we conclude that its strategic effort to receive construction services from non-Indians at a competitive discount by circumventing the state sales tax does not outweigh California's interest in raising general funds for its treasury.").

248. *See, e.g.*, *Mashantucket Pequot Tribe*, 722 F.3d at 475 ("The Town's economic interest therefore exceeds the value of the taxes on slot machines, insofar as a ruling favorable to the Tribe could invite other non-Indian owners of personal property on the reservation to initiate similar actions."); *Barona Band of Mission Indians*, 528 F.3d at 1193–94 ("We disagree, however, that the *Bracker* preemption test invalidates the state tax where the Tribe has invited commercial activity onto its territory for the purpose of marketing a sales tax exemption to non-Indian businesses who would otherwise be liable for the state tax under laws of general applicability."); Prairie Band Potawatomi Nation v. Richards, 241 F. Supp. 2d 1295, 1308 (D. Kan. 2003) ("The court cast serious doubt on the tribe's attempt to read *Colville* so narrowly and held that even if *Colville* is narrowly read, the state tax will be allowed where the tribe is attempting to sell non-Indian products to non-Indians and where the state tax precludes the tribe from creating the type of tax haven the *Colville* court sought to prevent."), *rev'd*, 379 F.3d 979 (10th Cir. 2004), *rev'd sub nom.* Wagnon v. Prairie Band

Contrary to its deference to the states, the *Cotton Petroleum* line of cases merely pays lip service to tribal and federal interests. Courts acknowledge tribes have an interest in self-government and economic development,[249] as numerous statutes make it impossible for courts to miss the federal government's interest in promoting tribal self-determination and economic development.[250] Nevertheless, courts downplay the tribal interest in collecting taxes as purely financial[251] and claim that state taxes have minimal impact on tribes' ability to fulfill the federal government's self-determination policy.[252] Ironically, while courts minimize tribal interest in tax collection, courts sometimes cede that the only interest states have in collecting taxes on tribal land is financial.[253] Under this line of reasoning, courts claim that these tribal and federal interests are insufficient to defeat the state interest in generating tax revenue.

Courts trivialize the damage state taxes cause tribal and federal interests by focusing on the legal incidence of the tax,[254] which *Cotton Petroleum* adopted from

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Potawatomi Nation, 546 U.S. 95 (2005); Salt River Pima-Maricopa Indian Cmty. v. Arizona, 50 F.3d 734, 738 (9th Cir. 1995) ("However, even if *Colville* could be limited in that manner, which is doubtful given its expansive language, it does not follow that the state tax here should be disallowed. Arizona's ability to tax these sales precludes the Community from creating a tax haven at the mall.").

249. *See, e.g.*, Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195, 201 (1985) ("The power to tax members and non-Indians alike is surely an essential attribute of such self-government; the Navajos can gain independence from the Federal Government only by financing their own police force, schools, and social programs"); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 138 n.5 (1982) ("We agree with Judge McKay's observation that '[i]t simply does not make sense to expect the tribes to carry out municipal functions approved and mandated by Congress without being able to exercise at least minimal taxing powers, whether they take the form of real estate taxes, leasehold taxes or severance taxes.'" (citation omitted)).

250. *See* 25 U.S.C. § 5301(a); *Id.* § 2701(4); 25 C.F.R. § 151.3(a)–(b); Exec. Order No. 14049, 86 Fed. Reg. 57313, 57313 (Oct. 11, 2021) ("The Federal Government is committed to protecting the rights and ensuring the well-being of Tribal Nations while respecting Tribal sovereignty and inherent rights of self-determination.").

251. *E.g.*, Tulalip Tribes v. Washington, 349 F. Supp. 3d 1046, 1063 (W.D. Wash. 2018) ("[T]he only sovereignty interest being impeded in this case is the Tribes' ability to collect the full measure of its own taxes—an interest that is essentially little more than financial.").

252. Agua Caliente Band of Cahuilla Indians v. Riverside Cnty., No. ED CV 14-0007 DMG (DTBx), 2017 WL 4533698, at *17 (C.D. Cal. June 15, 2017) ("[T]he Court concludes that any adverse effect the PIT has on the Tribe is minimal and insufficient to tip the *Bracker* scale in favor of preemption."), *aff'd*, 749 F. App'x 650 (9th Cir. 2019); Muscogee (Creek) Nation v. Pruitt, 669 F.3d 1159, 1172 (10th Cir. 2012) ("Instead, the Supreme Court has repeatedly found that the preemption and infringement barriers do not prevent the state from taxing non-Indians in Indian country so long as the tax imposes only minimal burdens on the Indians.").

253. *E.g.*, *Tulalip Tribes*, 349 F. Supp. 3d at 1060 ("The primary interest asserted by both the State and Snohomish County is an interest in raising revenue, which courts have routinely found to be 'a legitimate state interest.'").

254. *See* Salt River Pima-Maricopa Indian Cmty. v. Arizona, 50 F.3d 734, 737 (9th Cir. 1995); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 8.32[1][b] (Nell Jessup Newton

*Moe*.[255] If the legal incidence of the tax falls upon a non-Indian, courts uphold the tax.[256] The trouble is the legal incidence does not reflect the economic reality.[257] The economic incidence of the tax gauges who actually bears the financial burden of the tax.[258] Determining who bears the economic incidence of the tax can be a complex question.[259] However, discerning a tax's legal incidence is simply a matter of the legislature declaring what party pays the tax.[260] Though courts know the placement

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et al. eds., LexisNexis 2012); Erik M. Jensen, *Taxation and Doing Business in Indian Country*, 60 ME. L. REV. 1, 57 (2008) ("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. 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.").

255. Cotton Petrol. Corp. v. New Mexico, 490 U.S. 163, 185 (1989) ("The present case is also unlike *Bracker* and *Ramah Navajo School Bd.,* in that the District Court found that '[n]o economic burden falls on the tribe by virtue of the state taxes . . . .'"); *id.* at 187 n.18 ("It is important to keep in mind that the primary burden of the state taxation falls on the non-Indian taxpayers.").

255. *Id.* at 191.

256. Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 459 (1995) ("But if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if 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 . . . .").

257. Seminole Tribe of Fla. v. Florida, 49 F. Supp. 3d 1095, 1103 (S.D. Fla. 2014) ("Economists distinguish between the *economic incidence* of a tax and its *statutory incidence*." (emphasis in original)), *aff'd in part, rev'd in part sub nom.* Seminole Tribe of Fla. v. Stranburg, 799 F.3d 1324 (11th Cir. 2015); Coeur d'Alene Tribe of Idaho v. Hammond, 384 F.3d 674, 681 (9th Cir. 2004) ("The person or entity bearing the legal incidence of the tax is not necessarily the one bearing the economic burden."); Cowan, *supra* note 21, at 8 ("While legal incidence is a function of the taxing statute—and thus could easily be changed by lawmakers—economic incidence is a function of contractual arrangements and market realities.").

258. Cowan*, supra* note 21, at 7 ("The economic incidence falls on the party that actually bears the burden of the tax."); Ian Clark, *Burden of a Tax–Economic vs. Legal Incidence*, ATLAS OF PUB. MGMT, https://www.atlas101.ca/pm/concepts/burden-of-a-tax-economic-vs-legal-incidence [https://perma.cc/LV3M-3T9Q] (Apr. 29, 2016) ("The economic incidence (who bears the burden) of a tax differs from the legal incidence (who writes the cheque to the government) in ways that depend on the relative elasticities of supply and demand.").

259. Cowan, *supra* note 21, at 8 ("Thus, while it is generally clear who bears the legal incidence of a tax, it is often less clear who bears the economic incidence."); Pomp, *supra* note 20, at 1129 ("Like *Warren Trading*, there was no evidence in the *White Mountain* record about the issue of economic incidence. Normally, the issue of economic incidence is a tricky empirical question, and not resolved by who actually remits the tax.").

260. *See, e.g.*, Confederated Tribes & Bands of the Yakama Indian Nation v. Gregoire, 658 F.3d 1078, 1084 (9th Cir. 2011) ("The 'legal incidence' of an excise tax refers to determining which entity or person bears the ultimate legal obligation to pay the tax to the taxing authority."); Sac & Fox Nation of Mo. v. Pierce, 213 F.3d 566, 578 (10th Cir. 2000) ("[T]he legal incidence of a tax falls upon the entity or individual necessarily responsible for paying the tax under the taxing statutes."); Squaxin Island Tribe v. Stephens, 400 F. Supp. 2d 1250, 1255–56 (W.D. Wash. 2005) ("[T]o discern where the legal incidence lies, we ascertain the legal obligations imposed upon the concerned parties, and this inquiry does not extend to

of the legal incidence is purely a matter of legislative legerdemain,[261] courts use the legal incidence test anyway because it is convenient.[262] By choosing to rely on the legal incidence of the tax, courts sacrifice tribal sovereignty on the altar of ease.[263]

Accordingly, the state interest in preventing competition and generating revenue overrides the tribal and federal interests in tribes achieving self-sufficiency and economic development. As one example, the Second Circuit Court of Appeals stated:

> We recognize that this is arguably a close case. However, the Tribe's generalized interests in sovereignty and economic development are not significantly impeded by the State's generally-applicable tax; neither are the federal interests protected in IGRA. The Town has moderate economic and administrative interests at stake, and the affront to the State's sovereignty on one hand approximates the affront to the Tribe's sovereignty on the other. The balance of equities here favors the Town and State.[264]

Other courts have applied similar reasoning.[265]

## III. STATES GET THE TAXES, BUT WHAT DO TRIBES GET?

There is no accountability for the tax money states take from tribes. The billions of dollars states siphon from Indian country simply vanish into state budgets. As state budgets are designed by elected non-Indians,[266] it seems likely states will

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divining the legislature's true economic object. Further, a party does not bear the legal incidence of the tax if it is merely a transmittal agent for the state tax collector." (quoting *Coeur d'Alene Tribe*, 384 F.3d at 681)).

261. *See* Seminole Tribe of Fla. v. Stranburg, 799 F.3d 1324, 1350 (11th Cir. 2015) ("The distinction might be one of form over substance, but the Supreme Court recognized as much was possible when it acknowledged that a state can shift the legal incidence of a tax through wordsmithing.").

262. *See* Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 459–60 (1995) ("But our focus on a tax's legal incidence accommodates the reality that tax administration requires predictability. The factors that would enter into an inquiry of the kind the State urges are daunting.").

263. *See* Cowan, *supra* note 21, at 9 ("Overlapping tax regimes can also injure tribal governments. Using legal incidence as the touchstone of taxation is formalistic, allowing states to effectively tax tribes and tribal members (i.e., to impose economic incidence on those taxpayers) by calibrating their tax statutes to place the legal incidence of a tax on nonmembers.").

264. Mashantucket Pequot Tribe v. Town of Ledyard, 722 F.3d 457, 476–77 (2d Cir. 2013).

265. *E.g.*, Flandreau Santee Sioux Tribe v. Houdyshell, 50 F.4th 662, 676 (8th Cir. 2022); Gila River Indian Cmty. v. Waddell, 91 F.3d 1232, 1239 (9th Cir. 1996); Salt River Pima-Maricopa v. Arizona, 50 F.3d 734, 738–39 (9th Cir. 1995).

266. Some Indians do serve in state legislatures. However, Indians do not make up a majority in any state legislature. More Indians are represented in Montana than any other state legislature. The are seven Indians in Montana's 150-person legislature, less than 5%. *See* Nicky Ouellet, *Native American Representation Proportionate to Population in Montana Legislature*, MONT. PUB. RADIO (Nov. 9, 2016, 5:48 PM), https://www.mtpr.org/montana-news/2016-11-09/native-american-representation-proportionate-to-population-in-montana-legislature [https://perma.cc/SQ4S-JNRS].

use the tribal funds to benefit important constituencies. Indians are approximately 1% of the United States' population[267] and have the highest poverty rate in the country.[268] State legislatures are not designed to serve tribal interests; in fact, states have long been identified as tribes' "deadliest enemies."[269] *Cotton Petroleum* does not mandate any proportionality requirement between the money states take from Indian country and the state services rendered to the tribe.[270] Hence, it is reasonable to assume states will not deliver services commensurate with the value they extract from tribes.

While official statistics do not exist, federal court cases suggest tribes are not getting much bang for their buck from states. For example, the unpaved roads on the Ute Mountain Ute Reservation are maintained by the tribe, the Bureau of Indian Affairs, and private companies.[271] New Mexico does not provide any value to the Ute Mountain Ute Reservation; indeed, New Mexico does not even list the Ute Mountain Ute among the tribes within the state.[272] Notwithstanding, the Tenth Circuit Court of Appeals permits New Mexico to tax the Ute Mountain Ute Tribe's oil production because the state builds roads *off of the reservation*.[273] Another example comes from the Eighth Circuit Court of Appeals, which recently concluded that South Dakota can take money from the Flandreau Santee Sioux Tribe and place the money in the state's general fund for purely off-reservation services.[274] Additionally, the Supreme Court accepted Kansas's claim that it used tribal tax dollars to maintain the Prairie Band Potawatomi Nation's roads and bridges;[275] however, Justice Ginsburg noted, "The record reveals a different reality."[276] That

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267. *Quick Facts United States*, U.S. CENSUS BUREAU (July 1, 2023), https://www.census.gov/quickfacts/fact/table/US/PST045223 [https://perma.cc/MWM8-RDEA].

268. *See* Em Shrider, *Black Individuals Had Record Low Official Poverty Rate in 2022*, U.S. CENSUS BUREAU, https://www.census.gov/library/stories/2023/09/black-poverty-rate.html [https://perma.cc/5459-3Z9Z] (Nov. 1, 2024).

269. *See* Oklahoma v. Castro-Huerta, 597 U.S. 629, 687–88 (2022) (Gorsuch, J., dissenting); United States v. Kagama, 118 U.S. 375, 384 (1886) ("Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.").

270. Cotton Petrol. Corp. v. New Mexico, 490 U.S. 163, 189–90 (1989).

271. *See* Ute Mountain Ute Tribe v. Homans, 775 F. Supp. 2d 1259, 1261 (D.N.M. 2009), *rev'd and remanded sub nom.* Ute Mountain Ute Tribe v. Rodriguez, 660 F.3d 1177 (10th Cir. 2011).

272. *See 23 NM Federally Recognized Tribes in NM Counties*, N.M. SEC'Y OF STATE, https://www.sos.nm.gov/voting-and-elections/native-american-election-information-program/23-nm-federally-recognized-tribes-in-nm-counties [https://perma.cc/P53V-4T3E] (last visited Sept. 30, 2024).

273. *Rodriguez*, 660 F.3d at 1199 ("[T]he more important state service—and the one that primarily justifies the New Mexico taxes at issue—is the off-reservation infrastructure used to transport the oil and gas after it is severed.").

274. Flandreau Santee Sioux Tribe v. Houdyshell, 50 F.4th 662, 674–75 (8th Cir. 2022).

275. Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 115 (2005) ("Kansas uses the proceeds from its fuel tax to pay for a significant portion of the costs of maintaining the roads and bridges on the Nation's reservation, including the main highway used by the Nation's casino patrons.").

276. *Id.* at 129 (Ginsburg, J., dissenting).

reality is the Prairie Band paid for the road maintenance on its reservation because the state refused to expend funds on the reservation.[277]

The evidence demonstrates Indian country tax dollars are subsidizing states.[278] Rodney Butler, Chairman of the Mashantucket Pequot Tribal Nation, testified that the tribe provides all of the government services and infrastructure on its reservation.[279] The state and local governments add no value on the Pequot Reservation leading Chairman Butler to note, "[T]he diverted tax revenues from on-reservation businesses are used by state and local governments to serve non-Indian populations in neighboring communities, rather than our citizens on our reservation."[280] The Tulalip Tribes provide all the government services at Quil Ceda Village ("QCV"), an economic zone located on its reservation,[281] but the state of Washington and the local county collect $40 million a year in taxes from QCV.[282] The Bakken oil boom led to substantial economic development on the Mandan, Hidatsa, and Arikara Nation,[283] and North Dakota took most of the tax revenue.[284] Mark Fox, Chairman of the Mandan, Hidatsa, and Arikara Business Council, stated, "As the Tribe is forced to ask for more federal dollars the State of North Dakota maintains a 4-billion-dollar rainy day fund due in large part to the oil and gas taxes

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277. *Id.* ("According to the affidavit of the Director of the Nation's Road and Bridge Department, Kansas and its subdivisions have failed to provide proper maintenance even on their own roads running through the reservation. As a result, the Nation has had to assume responsibility for a steadily growing number of road miles within the reservation." (citation omitted)).

278. *See* BUREAU OF INDIAN AFFS., ADDRESSING THE HARMS OF DUAL TAXATION IN INDIAN COUNTRY THROUGH MODERNIZING THE INDIAN TRADER REGULATIONS, *supra* note 19, at 1 ("To add insult to injury, reservation economies are funneling millions of tax dollars into treasuries of state and local governments who spend the funds outside of Indian country."); JONATHAN TAYLOR, WASH. INDIAN GAMING ASS'N, THE ECONOMIC & COMMUNITY BENEFITS OF TRIBES IN WASHINGTON 15 (2022), https://www.washingtonindiangaming.org/wp-content/uploads/2022/05/WIGA_EconomicImpact_FullReport-digitalv2.pdf [https://perma.cc/39AC-9ZFF] ("The indirect and induced economic impacts yield taxable activities in the economy—$1.2 billion in 2019 and $1.1 billion in 2020—the bulk of which accrued to Washington state and local governments."); Srikrishnan et al., *supra* note 1.

279. *Hearing on Examining the Impact of the Tax Code*, *supra* note 10, at 2 (statement of Rodney Butler, Chairman, Mashantucket Pequot Tribal Nation) ("However, instead of us collecting the tax revenue from this development, the Town of Ledyard has intrusively taxed these businesses, despite the tribe providing all on reservation governmental services and infrastructure maintenance.").

280. *Id.*

281. Tulalip Tribes v. Washington, 349 F. Supp. 3d 1046, 1060 (W.D. Wash. 2018) ("[T]he Tulalip Tribes have — are providing, continue to provide . . . the full list of municipal governmental services that you would expect a municipal government to be providing." (quoting testimony of Joseph Kalt)).

282. *Id.* at 1052–53.

283. *American Indian and Alaska Native Public Witness Day 1: Hearing Before the H. Appropriations Subcomm. on Interior, Env't, & Related Agencies*, 116th Cong. 1 (2020) [hereinafter *Hearing on American Indian and Alaska Native Public Witness Day 1*] (statement of Mark N. Fox, Chairperson, MHA Nation's Tribal Bus. Council).

284. *See* Adam Crepelle, *Finding Ways to Empower Tribal Oil Production*, 22 WYO. L. REV. 25, 46–47 (2022).

taken from the Tribe."[285] Hence, tribal economic development serves as the surrounding state's piggy bank.[286]

State taxation prevents tribes from building basic infrastructure. Ninety-three percent of tribally owned roads are unpaved.[287] In 2016, a U.S. House of Representatives report found approximately half of the homes in tribal communities "do not have access to reliable water sources, clean drinking water, or basic sanitation."[288] Approximately 15% of tribal homes do not have electricity.[289] Tribal communities lag far behind the country in broadband access, an estimated 20% of people on tribal land do not have broadband versus 4% of the nation as a whole.[290] The tribal–nontribal broadband gap is significantly larger than the Black–white access gap and the urban–rural access gap.[291] Moreover, tribal access speeds are nearly twice as slow as the internet speed outside of Indian country.[292] Although the federal government should be assisting with tribal infrastructure pursuant to its trust relationship,[293] state taxes hamstring tribes' ability to build infrastructure.

Poor infrastructure contributes to many of Indian country's socioeconomic troubles. Unpaved roads make transportation more difficult—often impossible in

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285. *Hearing on American Indian and Alaska Native Public Witness Day 1*, *supra* note 283, at 3.

286. *E.g.*, Jillian Corder, *Several Local Agencies Caught off Guard by Major Change in Coushatta Tribe Agreement*, KPLC 7 NEWS (Feb. 2, 2024, 2:41 PM), https://www.kplctv.com/2024/02/02/agencies-wondering-whether-tribal-funding-will-continue [https://perma.cc/D4DE-UWWH] ("The gaming revenue makes up roughly 20 to 25 percent of the budget for the town of Oberlin, according to Mayor Larry Alexander. It's used primarily for the police department, but has also helped with roads, maintenance, and other bills.").

287. U.S. COMM'N ON C.R., *supra* note 14, at 168.

288. *Executive Summary* to DEMOCRATIC STAFF OF THE H. COMM. ON NAT. RES., 114TH CONG., REP. ON WATER DELAYED IS WATER DENIED: HOW CONGRESS HAS BLOCKED ACCESS TO WATER FOR NATIVE FAMILIES (2016), http://blackfeetnation.com/wp-content/uploads/2016/10/House-NRC-Water-Report-Minority-10-10-16.pdf [https://perma.cc/R4KW-SRTT].

289. U.S. COMM'N ON C.R., *supra* note 14, at 171.

290. *GAO Highlights* to U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-104421, TRIBAL BROADBAND: NATIONAL STRATEGY AND COORDINATION FRAMEWORK NEEDED TO INCREASE ACCESS (2022) ("Nationwide, conservative estimates show more than 18 percent of people living on tribal lands remain unserved by broadband as of 2020, compared to about 4 percent of people in non-tribal areas.").

291. *Id.* at 18 ("In rural areas, where tribal lands are disproportionately located, the gap in broadband access between tribal and non-tribal lands is even greater: approximately 30 percent of people in rural tribal lands lacked broadband access compared to 14 percent in rural non-tribal lands."); *Exploring the Lack of Access on Native American Reservations*, CMTY. TECH NETWORK (July 28, 2023), https://communitytechnetwork.org/blog/exploring-the-lack-of-internet-access-on-native-american-reservations [https://perma.cc/GNS3-X4YZ].

292. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-104421, TRIBAL BROADBAND: NATIONAL STRATEGY AND COORDINATION FRAMEWORK NEEDED TO INCREASE ACCESS 18 (2022) (noting the availability of download speeds of 25 Mbps but Osage Nation residents report receiving "between 9 Mbps and 17 Mbps").

293. U.S. COMM'N ON C.R., *supra* note 14, at 1.

inclement weather.[294] Shoddy roads slow emergency response vehicle access[295] and hinder economic development.[296] Undeveloped roads also prevent children from attending schools.[297] The lack of clean water has long been to known to contribute to the numerous health maladies afflicting Indian country,[298] including the extremely high rate of COVID-19.[299] State taxes hinder tribes' ability to hire public safety personnel,[300] and, as the Supreme Court observed in 2016, "even when capable of exercising jurisdiction, however, States have not devoted their limited criminal justice resources to crimes committed in Indian country."[301] Hence, crime is a significant problem in much of Indian country.[302] State taxes undermine tribes' ability to function as governments and deprive reservation residents of the basic services and opportunities that most Americans take for granted.

## IV. PROVIDING A RECEIPT: REPORTING REQUIREMENTS ON STATE TAXATION OF TRIBAL COMMERCE

Tribes have struggled to discover how states spend Indian country tax dollars. In an attempt to address this and other taxation issues, some tribes and states

294. Daniel C. Vock, *In Navajo Nation, Bad Roads Can Mean Life or Death*, GOVERNING (June 27, 2017), https://www.governing.com/archive/gov-navajo-utah-roads-infrastructure.html [https://perma.cc/M4WS-ZLMB] ("Mostly composed of dirt, they're treacherous in good weather and frequently impassable after heavy rains or snows.").

295. *See* Adam Crepelle, *The Law and Economics of Crime in Indian Country*, 110 GEO. L. J. 569, 596 (2022).

296. *See* Special Message to the Congress on the Problems of the American Indian: "The Forgotten American", *supra* note 81, at 341 ("Without an adequate system of roads to link Indian areas with the rest of our Nation, community and economic development, Indian self-help programs, and even education cannot go forward as rapidly as they should.").

297. *Id.*; Frank Elswick, *On Indian Reservations, Unpaved Roads Can Stop Education in its Tracks*, MIDWEST INDUS. SUPPLY (June 18, 2019), https://blog.midwestind.com/on-indian-reservations-unpaved-roads-can-stop-education-in-its-tracks [https://perma.cc/YG35-42Q7]; Keerthi Vedantam, *In Indian Country, Potholes Can Be a Bump in the Road to an Education*, CRONKITE NEWS (May 15, 2019), https://cronkitenews.azpbs.org/2019/05/15/in-indian-country-potholes-can-be-a-bump-in-the-road-to-an-education [https://perma.cc/63UC-9LTY].

298. DEMOCRATIC STAFF OF THE H. COMM. ON NAT. RES., *supra* note 15, at 3.

299. Adam Crepelle, *Tribes, Vaccines, and COVID-19: A Look at Tribal Responses to the Pandemic*, 49 FORDHAM URB. L.J. 31, 38–39 (2021).

300. *See* AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 42 (2007), https://www.amnesty.org/fr/wp-content/uploads/2021/05/AMR510352007ENGLISH.pdf [https://perma.cc/GK8P-Q5YC] ("The US Departments of Justice and of the Interior have both acknowledged that there is inadequate law enforcement in Indian Country and identified lack of funds as a central cause."); *Tribal Law Enforcement*, TRIBAL CT. CLEARINGHOUSE, https://www.tribal-institute.org/lists/enforcement.htm [https://perma.cc/B3VW-SGUF] (Sept. 28, 2024) ("Inadequate funding is an important obstacle to good policing in Indian Country. Existing data suggest that tribes have between 55 and 75 percent of the resource base available to non-Indian communities.").

301. United States v. Bryant, 579 U.S. 140, 146 (2016).

302. *See* TROY A. EID ET AL., INDIAN LAW & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES v (2013); Crepelle, *supra* note 295, at 589–601.

have managed to negotiate compacts.[303] However, negotiating a compact between two sovereigns can be politically challenging.[304] And under the current rules governing Indian country taxation, states have all the leverage during compact negotiations.[305] Thus, compacts usually significantly favor states.[306] Not all compacts require states to report how they spend every single Indian country tax dollar either.[307] Compacting is fine, but tribes should not have to negotiate with the state to know how Indian country tax dollars are allocated.

As a precondition to extracting tax dollars from Indian country, states should be required to provide tribes with an accounting of the tax revenue and explain how it is spent. Fiscal transparency is consistent with notions of American democracy.[308] State reporting requirements would also improve government accountability.[309] The remainder of this Part discusses government transparency and how it applies to state taxation of Indian country.

### *A. Benefits of Transparency*

As long as states are permitted to tax tribal commerce, states should be subjected to transparency requirements. In government, transparency means freely sharing information about government operations with the public.[310] Easy access to

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303. *See, e.g.*, S.D. CODIFIED LAWS § 10-12A-2 (2023); MONT. BUDGET & POL'Y CTR., POLICY BASICS: TAXES IN INDIAN COUNTRY, PART 2: TRIBAL GOVERNMENTS 12 (2017), https://montanabudget.org/report/policy-basics-taxes-in-indian-country-part-2-tribal-governments [https://perma.cc/2K2J-FBL7]; Tax Agreement Between the Saginaw Chippewa Indian Tribe of Michigan and the State of Michigan, Saginaw Chippewa Indian Tribe-U.S., Dec. 17, 2010 (available at https://www.michigan.gov/-/media/Project/Websites/taxes/MISC/2011/2011_SaginawChippewa_AgreementandAppendix.pdf?rev=41f9288af30 54fd7937a47cc1e1484ce [https://perma.cc/Q9E7-GWL8]); *Tribal Cooperative Agreements*, TAX'N & REVENUE OF N.M., https://www.tax.newmexico.gov/governments/tribal-governments/tribal-cooperative-agreements [https://perma.cc/3JNW-F9GR] (last visited Sept. 30, 2024).

304. Browde, *supra* note 21, at 37 ("Existing literature cites the downsides of compacting as creating agreements that are unfair to tribes and politically untenable, in that they foster distrust among non-tribal voters.").

305. *Id.* at 34–35.

306. *Id.*

307. *E.g.*, Cooperative Agreement Between the Jicarilla Apache Revenue and Taxation Department and the Taxation and Revenue Department of the State of New Mexico Regarding the Gross Receipts Tax, Apache Nation-N.M., Dec. 28, 2004 (available at https://klvg4oyd4j.execute-api.us-west-2.amazonaws.com/prod/PublicFiles/34821a9573ca43e7b06dfad20f5183fd/b86127cf-f28f-4102-80f2-b29cf749e37d/Jicarilla%20Apache%20Nation%20and%20NM%20Taxation%20and%20Revenue%20Department.pdf [https://perma.cc/6QN2-Z2W8]).

308. Klarman, *supra* note 23, at 38.

309. Transparency and Open Government, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4685, 4685 (Jan. 21, 2009) ("Transparency promotes accountability and provides information for citizens about what their Government is doing. Information maintained by the Federal Government is a national asset.").

310. *See* Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339, 1343 (2011); Carl-Sebastian Zoellner, *Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law*, 27 MICH. J. INT'L L. 579, 583 (2006).

information facilitates debate and is essential to democratic governance;[311] hence, transparency is a hallmark of American government.[312] Transparency promotes accountability by subjecting government action to public scrutiny.[313] Similarly, transparency makes it more difficult for public officials to engage in unscrupulous behavior.[314] Due to these benefits, Justice Brandeis wrote, "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[315]

Numerous laws govern transparency across various realms of government;[316] however, fiscal transparency is particularly important. Fiscal transparency means the public is provided with complete access to how government revenues are raised and expended.[317] Greater fiscal transparency is correlated with greater government effectiveness.[318] Governments that are more open about their budgets have lower levels of debt;[319] likewise, "the more information the budget discloses, the less the politicians can use fiscal deficits to achieve opportunistic goals."[320] Fiscal transparency is also linked to higher government credit ratings,[321]

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311. Tal Z. Zarsky, *Transparent Predictions*, 2013 U. ILL. L. REV. 1503, 1530 (2013).

312. Marshall J. Breger, *Government Accountability in the Twenty-First Century*, 57 U. PITT. L. REV. 423, 426 (1996) ("One distinctly American approach to ensuring government accountability has been a bias towards openness in government.").

313. Zarsky, *supra* note 311, at 1533–34 ("Transparency is an essential tool for facilitating accountability because it subjects politicians and bureaucrats to the public spotlight.").

314. *Id.*; Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79, 82–83, 88, 93 (2012).

315. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (Forgotten Books & Co. Ltd. 2016) (1914) (ebook).

316. *See* 5 U.S.C. § 552; Christina Koningisor, *Transparency Deserts*, 114 NW. U. L. REV. 1461, 1473–79 (2020) (discussing state public records laws).

317. ORG. ECON. COOP. & DEV., OECD BUDGET TRANSPARENCY TOOLKIT: PRACTICAL STEPS FOR SUPPORTING OPENNESS, INTEGRITY AND ACCOUNTABILITY IN PUBLIC FINANCIAL MANAGEMENT 9 (2017), https://www.oecd-ilibrary.org/docserver/9789264282070-en.pdf?expires=1731636327&id=id&accname=guest&checksum=26DD5CD87C8F3A661999A7E6B3DEAD44 [https://perma.cc/3HQJ-6KL5] ("There are various definitions of budget transparency and fiscal transparency, but they can all be summarised in one core concept: *budget transparency means being fully open with people about how public money is raised and used*." (emphasis bolded in original)).

318. Gabriel Caldas Montes et al., *Fiscal Transparency, Government Effectiveness and Government Spending Efficiency: Some International Evidence Based on Panel Data Approach*, 79 ECON. MODELLING 211, 214 (2019) ("Regarding the three samples, the graphs indicate positive correlations between fiscal transparency and government effectiveness for the years of 2006 and 2014.").

319. *Id.* at 212 ("Arbatli and Escolano (2015) find evidence that higher levels of fiscal transparency are associated with lower debt to GDP ratio.").

320. *Id.*

321. Borce Trenovski, *Fiscal Transparency, Accountability and Institutional Performances as a Foundation of Inclusive and Sustainable Growth in Macedonia*, WORLD BANK 1 (2017), https://thedocs.worldbank.org/en/doc/278551516728264974-0080022018/original/BorceTrenovski1.pdf [https://perma.cc/CY24-TBJ6] ("In his research for

and investors are more likely to place their capital in jurisdictions with higher levels of fiscal transparency.[322] Furthermore, openness about revenue generation and spending facilitates a more inclusive government.[323]

***B. Mandating Transparency for States***

Fiscal transparency can help strengthen tribal–state relationships. Taxation has been the source of numerous tribal–state conflicts.[324] While tribes view state taxation as an unconstitutional infringement upon their sovereignty,[325] another source of friction is the lack of services they receive for the money extracted from their territories.[326] States often assert they provide valuable services to Indian country, but states seldom account for the benefits they allegedly bestow upon tribes.[327] Requiring states to provide tribes with a list of the revenue extracted from and services delivered to Indian country would facilitate an informed dialogue between the sovereigns.

This information could help on multiple fronts. A report could help establish whether states are remitting the tax dollars they take from Indian country back to tribes. If states are collecting tens of millions of dollars a year from a tribe's reservation but providing less than $100,000 in services,[328] the report will raise awareness of the inequitable distribution of tribal tax revenue. Additionally, some states present themselves as benevolent partners with tribes.[329] A report revealing states are extracting substantial sums from tribes could shame states into taking less money or delivering more benefits to tribes. Access to this information would also

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connections between fiscal transparency and economies outcomes, Hameed (2005) finds out that more transparent countries are shown to have better credit ratings, better fiscal discipline, and less corruption, after controlling other socioeconomic variables.").

322. *Id.* at 2 ("Gelos and Wei (2005) find that more (fiscally) transparent countries attract more foreign equity investment and are less vulnerable to withdrawals during times of economic downturns.").

323. *See* ORG. ECON. COOP. & DEV., *supra* note 317, at 9.

324. *See supra* Part II.

325. LYNN MALERBA ET AL., TREASURY TRIBAL ADVISORY COMMITTEE SUBCOMMITTEE ON DUAL TAXATION REPORT 2 (2020), https://home.treasury.gov/system/files/136/TTAC-Subcommittee-on-Dual-Taxation-Report-1292020.pdf [https://perma.cc/AK3S-BK9X] ("[State and local government taxation] is in direct conflict with the Indian Commerce clause in the Constitution (Art. I, Sec. 8, Cl. 3), which provides that solely the Congress may regulate commerce with the Indian nations.").

326. *Hearing on Examining the Impact of the Tax Code*, *supra* note 10, at 2 (statement of Rodney Butler, Chairman, Mashantucket Pequot Tribal Nation).

327. Srikrishnan et al., *supra* note 1 ("And many tribal leaders say states, after collecting taxes from tribal economic activity, provide minimal services that benefit tribal citizens on reservations."); *id.* ("Several states said they collaborate with tribal governments on taxation, though they gave little detail on the services they provide on reservations in exchange for the taxes they collect.").

328. *See* Tulalip Tribes v. Washington, 349 F. Supp. 3d 1046, 1060 (W.D. Wash. 2018); Mashantucket Pequot Tribe v. Town of Ledyard, 722 F.3d 457, 476–77 (2d Cir. 2013).

329. *See, e.g.*, ADMIN. OF GOV. GAVIN NEWSOM, PATHWAYS TO 30X30 CALIFORNIA: ACCELERATING CONSERVATION OF CALIFORNIA'S NATURE 20 (2022), https://resources.ca.gov/-/media/CNRA-Website/Files/Initiatives/30-by-30/Final_Pathwaysto30x30_042022_508.pdf [https://perma.cc/VKC7-3DCA].

help dispel the stereotypes that Indian country does not pay taxes[330] and that tribes drain state and federal tax dollars. These stereotypes may fade if more people realize states are actually free riding off of tribes.[331] Hence, fiscal transparency can change the narrative around tribes and taxes. In doing so, data can drive policy reform.

An additional benefit of greater fiscal transparency is more effective tribal governance. Tribes know they lose significant sums of tax revenue to states every year. But without knowing where those tax dollars go or what benefits the state will deliver to the reservation, developing an accurate tribal fiscal policy is far more difficult. Information about what services the state will provide enables tribes to plan more efficiently. For example, New Mexico would be more likely to include the Ute Mountain Ute Tribe on the list of tribes within its borders and collaborate with the tribe if the state was obligated to deliver a tax report to the tribe.[332] Better tribal governance benefits those in Indian country as well as those in adjacent communities.[333]

Mandating states to explain the services that they deliver to Indian country has legal significance. Under *Bracker*, tribal–state tax disputes hinge on the balance of state and tribal interests,[334] so knowing how the state spends the money it takes from Indian country is relevant. For example, if the state is providing no services to Indian country, the state interest seems to be raw desire for revenue.[335] The state's failure to deliver services to Indian country once carried weight in the Supreme Court.[336] Some federal judges still believe the state's failure to add value to Indian

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330. Notably, tribes themselves are tax exempt, as are other governments.

331. Gavin Clarkson, *The Problem of Double-Taxation in Indian Country*, 69 FED. LAW. 33, 35 (2022) ("Unfortunately, cash-strapped states continued to look at on-reservation resources and activity as potential 'free money,' and subsequent cases proved disastrous."); Srikrishnan et al., *supra* note 1.

332. *See 23 NM Federally Recognized Tribes in NM Counties*, *supra* note 272.

333. *See, e.g.*, KYLE D. DEAN, OKLA. TRIBAL FIN. CONSORTIUM, THE ECONOMIC IMPACT OF TRIBAL NATIONS IN OKLAHOMA (2019), https://www.oknativeimpact.com/wp-content/uploads/2022/03/All-Tribe-Impact-Report-2022-Final.pdf [https://perma.cc/JM56-BPTR]; STEVEN PETERSON, THE FIVE TRIBES OF IDAHO, TRIBAL ECONOMIC IMPACTS: THE ECONOMIC IMPACTS OF THE FIVE IDAHO TRIBES ON THE ECONOMY OF IDAHO (2015), https://www.sde.idaho.gov/indian-ed/files/curriculum/Idaho-Tribes-Economic-Impact-Report.pdf [https://perma.cc/Y7UX-QFC9]; TAYLOR, *supra* note 278, at 8, 10, 12; Mark Trahant, *How the Economy of Indian Country Impacts Local Communities*, HIGH COUNTRY NEWS (Apr. 6, 2022), https://www.hcn.org/articles/economy-how-the-economy-of-indian-country-impacts-local-communities [https://perma.cc/B3V3-GAL4].

334. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144–45 (1980).

335. Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832, 845 (1982) ("The State's ultimate justification for imposing this tax amounts to nothing more than a general desire to increase revenues.").

336. *Id.* at 844 ("Furthermore, although the State may confer substantial benefits on Lembke as a state contractor, we fail to see how these benefits can justify a tax imposed on the construction of school facilities *on tribal lands* pursuant to a contract between the tribal organization and the non-Indian contracting firm. The New Mexico gross receipts tax is intended to compensate the State for granting 'the privilege of engaging in business.'"); *Bracker*, 448 U.S. at 150 ("We do not believe that respondents' generalized interest in raising revenue is in this context sufficient to permit its proposed intrusion into the federal regulatory

country should prohibit states from taxing tribal commerce.[337] Accordingly, accurate accounting could change the outcome of litigation. And apart from *Bracker*, basic notions of due process require a link between the tax and the activity the state seeks to tax.[338] Identifying the link requires data, and reporting requirements serve this purpose.

Furthermore, reporting requirements are a minimal burden. The Supreme Court mandates that tribes check the identification of each purchaser and maintain detailed records.[339] These recordkeeping costs are borne by the tribe and Indian country businesses[340] and are more complex than what the state would be required to report. The state already has the tax collection information and a department of revenue; therefore, the state can easily identify what services it provides to Indian country. All states need to do is transmit the taxing and spending information to the tribes.

A potential complication to state reporting requirements could exist on checkerboarded reservations—alternating parcels of fee simple and trust land.[341] States often govern non-Indian fee lands within Indian country.[342] Bifurcating

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scheme with respect to the harvesting and sale of tribal timber."); Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685, 691 (1965) ("And since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax.").

337. *See, e.g.*, Flandreau Santee Sioux Tribe v. Houdyshell, 50 F.4th 662, 681 (8th Cir. 2022) (Kelly, J., dissenting); Ute Mountain Ute Tribe v. Rodriguez, 660 F.3d 1177, 1203 (10th Cir. 2011) (Lucero, J., dissenting); Ute Mountain Ute Tribe v. Homans, 775 F. Supp. 2d 1259, 1292 (D.N.M. 2009).

338. Allied-Signal, Inc. v. Dir., Div. of Tax'n, 504 U.S. 768, 778 (1992) ("Although our modern due process jurisprudence rejects a rigid, formalistic definition of minimum connection, we have not abandoned the requirement that, in the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax." (citation omitted)); Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940) ("The simple but controlling question is whether the state has given anything for which it can ask return.").

339. *See supra* notes 133–34 and accompanying text.

340. KELLY S. CROMAN & JONATHAN B. TAYLOR, WHY BEGGAR THY INDIAN NEIGHBOR? THE CASE FOR TRIBAL PRIMACY IN TAXATION IN INDIAN COUNTRY 12 (2016), https://www.bia.gov/sites/default/files/dup/assets/as-ia/raca/pdf/2016_Croman_why_beggar_thy_Indian_neighbor.pdf [https://perma.cc/3SCJ-TRQU] ("This not only puts a strange burden on the retailer—who must ask for proof of tribal affiliation and marital status at the register—but also intrudes into household decision-making. Does Mr. or Mrs. Underwood have the paperwork to do the Saturday shopping?"); Adam Crepelle, *It Shouldn't Be This Hard: The Law and Economic of Business in Indian Country*, 2023 UTAH L. REV. 1117, 1139–40 (2023).

341. *See Land Tenure Issues*, INDIAN LAND TENURE FOUND., https://iltf.org/land-issues/issues [https://perma.cc/ZG5V-BLGX] (last visited Oct. 2, 2024) ("As a result [of the General Allotment Act of 1887], trust lands, fee lands, and lands owned by tribes, individual Indians and non-Indians are mixed together on the reservation, creating a checkerboard pattern.").

342. *See* Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316 (2008); Strate v. A-1 Contractors, 520 U.S. 438 (1997); Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989); Montana v. United States, 450 U.S. 544 (1981).

governance between tribal and state authority based on title ownership is impractical.[343] States will likely claim checkerboarding makes reporting its Indian country taxing and spending figures difficult; however, the Supreme Court requires tribes to make this distinction on checkerboard reservations in tax matters.[344] If tribes can make this distinction without tax revenue, then states—which *do* collect tax revenue from tribal land—should be capable of making this distinction. Furthermore, fee simple lands within the boundaries of a reservation—even if owned by a non-Indian—are Indian country.[345] Indian country is land set aside for tribes.[346] Therefore, tribes should be informed of the services states claim to perform on tribal land.

Generating a taxing and spending report should be a simple matter. States have the information already. All states have to do is compile the information into a single document and submit it to each tribe whose Indian country it taxes. An annual accounting of this information should suffice for tribal planning purposes. States may complain about the cost; however, states have already taken the money from the tribes. Hence, the tribes have paid for the services—all tribes are asking for is a receipt. If states find the reporting requirement overly burdensome, this could indicate the state's accounting procedures are in need of reform. Therefore, the inability to be transparent with tribes could indicate a larger financial problem.

Admittedly, gauging the accuracy of the state report may be challenging. Finances can be manipulated,[347] so states could craft the statements to their own

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343. *See* City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197 (2005); *Brendale*, 492 U.S. at 448, 461 (Blackmun, J., concurring in the judgment in part and dissenting in part) ("This, in practice, will be nothing short of a nightmare, nullifying the efforts of both sovereigns to segregate incompatible land uses and exacerbating the already considerable tensions that exist between local and tribal governments in many parts of the Nation about the best use of reservation lands."); DeCouteau v. Dist. Cnty. Ct. for the Tenth Jud. Dist., 420 U.S. 425, 467 (1975) (Douglas, J., dissenting) ("Jurisdiction dependent on the 'tract book' promises to be uncertain and hectic.").

344. *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 653 (2001) ("An Indian tribe's sovereign power to tax—whatever its derivation—reaches no further than tribal land.").

345. 18 U.S.C. § 1151(a); McGirt v. Oklahoma, 591 U.S. 894, 906 (2020) ("Nor under the statute's terms does it matter whether these individual parcels have passed hands to non-Indians. To the contrary, this Court has explained repeatedly that Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others.").

346. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 254, at § 3.04[1].

347. *See* PAUL A. VOLCKER, *Preface* to VOLCKER ALLIANCE, TRUTH AND INTEGRITY IN STATE BUDGETING: LESSONS FROM THREE STATES (2015) https://www.volckeralliance.org/sites/default/files/Truth%20and%20Integrity%20in%20State%20Budgeting%20-%20Lessons%20from%20Three%20States%20-%20The%20Volcker%20Alliance.pdf [https://perma.cc/MJM2-DXTC] (acknowledging states sometimes "obscure their true financial position"); *GAO Finds Ongoing Serious Weaknesses in U.S. Government's Financial Statements*, U.S. GOV'T ACCOUNTABILITY OFF. (Feb. 16, 2023), https://www.gao.gov/press-release/gao-finds-ongoing-serious-weaknesses-u.s.-governments-financial-statements [https://perma.cc/52Q3-DUTE] ("The Government Accountability Office (GAO) is again unable to provide an opinion on the reliability of the

benefit. To help counter this, tribes should be entitled to audit the state financial records. Proof of misreporting could subject the state to financial penalties or bar the state from taxing the tribe. This would serve as a potent incentive to accurately report. Sharing inaccurate fiscal figures with tribes would also decrease trust in the state as a whole. If the state cannot candidly provide financial information to tribes, can it be trusted to provide accurate information to anyone else?

The reporting requirement could be created by the state or federal government. States disclose most of their taxing and spending.[348] No legitimate policy objective is served by concealing Indian country tax information. Accordingly, it is possible that a state could impose transparency requirements on itself. Alternatively, Congress could implement reporting requirements. Though a state may argue the federal mandate constitutes commandeering,[349] tax transparency is a commercial matter. Congress has clear authority to regulate commerce "with the Indian Tribes."[350] Federal courts can also impose reporting requirements. Federal courts have imposed tax reporting requirements on tribes,[351] so presumably federal courts can do the same to states.

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federal government's consolidated financial statements."); Steve Malanga, *Zeroing in on Government Fraud*, CITY J. (Winter 2017), https://www.city-journal.org/article/zeroing-in-on-government-fraud [https://perma.cc/UPS5-6W8M] (reporting on "misleading financial reporting by local governments").

348. *See* VOLCKER ALLIANCE, TRUTH AND INTEGRITY IN STATE BUDGETING: PREPARING FOR THE STORM 27 (2021), https://www.volckeralliance.org/sites/default/files/attachments/Truth-and-Integrity-in-State-Budgeting-Preparing-for-the-Storm.pdf [https://perma.cc/7ZXG-7H4Z] (noting all but eight states "comprehensively disclose the nature and value of tax expenditures"); *see also Current Activity*, WASH. STATE FISCAL INFO., https://fiscal.wa.gov/default [https://perma.cc/F6QL-SHD8] (last visited Oct. 2, 2024) (providing access to budgets and revenue for the state); S. WAYS & MEANS COMM., A CITIZEN'S GUIDE TO THE WASHINGTON STATE BUDGET 1 (2023), https://leg.wa.gov/LIC/Documents/EducationAndInformation/2023%20Citizens%20Guide%20to%20Operating%20Budget.pdf [https://perma.cc/N9SC-6DYJ] (last visited Oct. 2, 2024) ("[This report] provides[s] a clear and simple overview of the state budget and state revenues."); *Explore the Colorado State Budget*, COLO. GEN. ASSEMBLY (2024), https://leg.colorado.gov/explorebudget [https://perma.cc/V8GF-J6FH] (last visited Oct. 2, 2024) ("An in-depth introduction to how the budget is made and how funds are distributed."); *State Budgets*, LA. DIV. OF ADMIN., https://www.doa.la.gov/doa/opb/budget-documents/state-budgets/ [https://perma.cc/J8ZT-3A7Z] (last visited Oct. 2, 2024); *Tax Expenditure Reports*, ARIZ. DEP'T OF REVENUE, https://azdor.gov/reports-statistics-and-legal-research/tax-expenditure-reports [https://perma.cc/G3AN-6HCW] (last visited Oct. 2, 2024); *Governor's Office of Strategic Planning & Budgeting*, OFF. OF ARIZ. GOV. STRATEGIC PLANNING & BUDGETING, https://azospb.gov/2025-budget.html [https://perma.cc/K6BC-G47Z] (last visited Oct. 2, 2024); *Fiscal Year Tax Collections: 2022-2023*, N.Y. STATE DEP'T OF TAX'N & FIN., https://www.tax.ny.gov/research/collections/fy_collections_stat_report/2022-2023-annual-statistical-reports.htm [https://perma.cc/YC2S-P26G] (July 29, 2024); *State Budget 2024-2025*, N.Y. STATE ASSEMBLY, https://nyassembly.gov/2024budget [https://perma.cc/ 6MFY-6VXT] (last visited Oct. 2, 2024).

349. Haaland v. Brackeen, 599 U.S. 255, 280–85 (2023).

350. U.S. CONST. art. I, § 8, cl. 3.

351. *See supra* notes 133–34 and accompanying text.

Requiring states to report their taxing and spending in Indian country is reasonable. States know how much money they collect from Indian country and where they spend the money. A reporting requirement does not compel states to allocate funds in any particular fashion. Rather, reporting requirements are a simple transparency measure. Transparency in government is widely recognized as a positive—there is no reason why states cannot account for their Indian country taxing and spending.

## V. CONCLUSION

State taxation is a substantial impediment to tribal economic development and self-government. Although state taxation of tribal commerce is constitutionally dubious, the Supreme Court is unlikely to reassess its jurisprudence. Similarly, the odds of Congress precluding state taxation of Indian country commerce are slim. Realpolitik has long preempted the plain text of the law and morality in Indian affairs.[352] Perhaps one day tribes will be afforded the respect the U.S. Constitution and treaties promise them.[353] But that day seems far away.[354]

Recognizing this reality, so long as states are allowed to tax Indian country, they should be required to report how much money is collected from Indian country and how they spend the money. Reporting requirements promote transparency, which is universally recognized as a positive in democratic governments. Making information about the taxes states extract from Indian country publicly available could inspire states to better serve tribes and may foster more effective tribal and state governance. Knowing how states spend the money they take from Indian country is relevant to the balancing test courts use to determine whether states can tax Indian country commerce. Furthermore, reporting requirements are a minimal burden. States already have the information. Reporting requirements simply compel states to share the information with tribes. Therefore, states should be required to provide tribes with a receipt.

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352. *Brackeen*, 599 U.S. at 333 (Gorsuch, J., concurring) ("Often, Native American Tribes have come to this Court seeking justice only to leave with bowed heads and empty hands."); Adam Crepelle, *Lies, Damn Lies, and Federal Indian Law: The Ethics of Citing Racist Precedent in Contemporary Federal Indian Law*, 44 N.Y.U. REV. L. & SOC. CHANGE 529, 571 (2021) ("Principles of justice are not the determinative factor in contemporary federal Indian law cases; instead, federal Indian law cases often hearken to the Melian Dialogue wherein mighty Athens told Melos, '[R]ight, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must.'").

353. *Brackeen*, 599 U.S. at 333 (Gorsuch, J., concurring) ("Our Constitution reserves for the Tribes a place—an enduring place—in the structure of American life. It promises them sovereignty for as long as they wish to keep it.").

354. *See* W. Tanner Allread, *The Specter of Indian Removal: The Persistence of State Supremacy Arguments in Federal Indian Law*, 123 COLUM. L. REV. 1533, 1592 (2023) ("[T]he legacy of Indian Removal endures. For if Removal is not just the deportation of Native nations and peoples from their homelands but a legal assault on tribal sovereignty, it is clear that such an assault continues to this day."); *One State One Set of Laws One Oklahoma*, OKLA. GOV. J. KEVIN STITT, https://oklahoma.gov/oneoklahoma.html [https://perma.cc/ES8Q-Q7NY] (last visited Oct. 2, 2024).