THE UNENDING ONSLAUGHT ON TRIBAL SOVEREIGNTY: STATE INCOME TAXATION OF NON-MEMBER INDIANS

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I. INTRODUCTION

The exercise of political power by a state within Indian Country is a confusing legal problem that has vexed the American legal system from its inception and remains a fundamental source of ongoing litigation. The United States Supreme Court first faced the problem in *Worcester v. Georgia*[1] and decided that a state's power over the territory of an

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1. *See* 31 U.S. (6 Pet.) 515 (1832).

Indian tribe within a state's political boundaries stopped at the boundary of the tribe.[2] This conclusion rested on two fundamental theories. First, Indian tribes had a preexisting political existence that provided them with rights of self-government and the continued right to occupy their lands.[3] And second, the federal government, not the state government, possessed the political power to determine ongoing political relationships through its treaty-making power and the power to regulate commerce with the Indian tribes as spelled out in the Federal Constitution.[4] With the power to determine political relations resting in the federal government, any federal laws and any ratified treaties subordinated and nullified any state power over tribes and their protected territories.[5] A fundamental purpose of treaties between the United States and tribes was to protect the political autonomy of tribes and their territorial integrity, which was constantly threatened by white encroachment.[6]

As we move from 1832 to 2008, we find that states are eager to exercise their power within Indian Country. One such state power is the power of taxation. Tribes, their members, and all others within Indian Country continue to be subject to state attempts to impose their taxes whenever they can, even though *Worcester v. Georgia* seems to say that state power stops at the reservation boundary.[7] Federal case law now

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2. *See id.* at 561 ("The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . . .").

3. *See id.* at 542–43 ("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.").

4. *See id.* at 557 ("The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union.").

5. *See id.* at 561 ("The act of the state of Georgia, under which the plaintiff in error was prosecuted, is consequently void, and the judgment a nullity.").

6. *See* FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 42, 64, 88 (1994).

7. *See generally* Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005) (Kansas attempts to impose motor fuel taxes on gasoline sold at a station owned by the tribe on its reservation); Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995) (Oklahoma attempts to impose various taxes on the Chickasaw Nation and its members); Bryan v. Itasca County, 426 U.S. 373 (1976) (Minnesota county attempts to impose a property tax on the mobile home of a tribal member living on the Leech Lake Reservation); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1973) (Arizona attempts to impose its income tax on a Navajo woman who lives and works on the Navajo Nation); Warren Trading Post Co. v. Ariz. State Tax Comm'n, 380 U.S. 685 (1965) (Arizona attempts to impose its sales tax on a federally licensed Indian trader selling goods and services on the Navajo Nation); Thomas v. Gay, 169 U.S. 264 (1898) (Oklahoma Territory attempts to impose a tax on cattle owned by a

specifically provides that states cannot impose their taxes on tribes or their members for activities within Indian Country unless Congress allows such taxation by affirmative federal legislation.[8] In the case of non-Indians, the case law seems to say that states can tax non-Indians for their activities within Indian Country unless a treaty, federal law, or federal regulation preempts the state power to tax.[9] The Supreme Court of the United States has yet to address the question of a state's power to tax the on-reservation activity of an Indian who is not a member of the tribe where the activity takes place.[10] The most common situation involves a Native American who lives and works on the reservation of a tribe and is a member of a different tribe. In such a case in a state that has an income tax, the state usually takes the position that its power to tax incomes extends to that particular Native American.[11] If, however, the Native American were a member of the tribe where she lives and works, then the case law is clear—the state has no power to impose its income tax.[12]

In this Article, I assert that a state's power to impose its income tax does not extend to Native Americans who live and work on a reservation of a tribe of which they are not members. The primary legal authority for such a conclusion is *Worcester v. Georgia*[13] and the absence

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non-Indian when the cattle were on reservation lands under a lease with the tribe); The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866) (Kansas county attempts to impose property taxes on lands owned by Shawnee Indians).

8. *See Okla. Tax Comm'n*, 515 U.S. at 457–59.

9. *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 175 (1989).

10. *See* Ariz. Dep't of Revenue v. Blaze Constr. Co., 526 U.S. 32, 34 (1999) (involving imposition of Arizona's transaction privilege tax on a corporation owned by Native Americans from Montana where the corporation conceded that it should be treated as a non-Indian taxpayer; therefore, the issue discussed and analyzed in this Article was not decided).

11. *See, e.g.*, *In re* Smith, 158 B.R. 818, 818 (Bankr. D. Ariz. 1993) (finding that a Navajo husband of a member of the Hopi Tribe who lived with his wife on her reservation was liable for the Arizona income tax); LaRock v. Wis. Dep't of Revenue, 621 N.W.2d 907, 908–09 (Wis. 2001) (finding that a member of the Menominee Tribe who married a member of the Oneida Tribe, had children who were members of her husband's tribe, and lived and worked on her husband's reservation was subject to the Wisconsin income tax); N.M. Taxation & Revenue Dep't v. Greaves, 864 P.2d 324, 325 (N.M. Ct. App. 1993) (finding that a member of the Rosebud Sioux Tribe was subject to the New Mexico income tax when he lived on the Jicarilla Apache Tribe Reservation where he worked as a tribal judge); Luger v. Fong, N.D. Office of Admin. Hearings File No. 20050257 (Dec. 28, 2006) (on file with author) (finding that a member of the Cheyenne River Sioux Tribe was subject to the North Dakota income tax because she lived on the Standing Rock Tribe Reservation where she owned and operated a convenience store).

12. *See McClanahan*, 411 U.S. at 165 (prohibiting Arizona from imposing an income tax on a member of the Navajo Nation when she lived and worked on the reservation).

13. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

of any federal law challenging this conclusion. Nonetheless, some state appellate courts have concluded that federal law does authorize the state income taxation of the income of a Native American who lives and works on a reservation of which she is not a member.[14]

Part II of this Article provides an extensive history of the political status of Indian tribes, starting with the colonial period and ending in the 1940s. The dominant picture is one of political separation that necessarily means freedom from British, colonial, state, or federal taxation. In Part III, this Article considers the leading federal and state cases that have dealt with the question of state income taxation of non-member Indians. Part IV summarizes where the history and case law should take the United States Supreme Court when it ultimately decides the question. I conclude that the Court should treat all reservation Indians the same and recognize that they are exempt from state income tax when they live and work on a reservation.

II. THE ANTECEDENTS

A. The Colonial Period

In matters of taxation, the British colonies of North America did not impose taxes on those indigenous peoples who remained politically separate from the colonies. The legal treatment of tribes during the colonial period was very complex. Colonial officials negotiated a large number of treaties with tribes, and those treaties took numerous forms.[15] Only in Virginia did the practice arise of treating some tribes as politically subservient. These "tributary" tribes, by the terms in their treaties with Virginia, were subject to taxation.[16] But this taxation was symbolic and meant only to demonstrate and establish Virginia's dominance.[17] The actual taxation involved ritual and annual tribute of

14. See *supra* note 11.

15. *See generally* 1–20 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607–1789 (Alden T. Vaughan ed., 1979–1989) (20 vols.) [hereinafter EAID].

16. *See* J.H. ELLIOT, EMPIRES OF THE ATLANTIC WORLD: BRITAIN AND SPAIN IN AMERICA 1492–1830, at 42, 62 (2006) (describing an initial intention to exact substantial tribute from the indigenous peoples but then switching to ritual tribute, which in the case of the Powhatans amounted to ten beaver skins a year in a treaty concluded in 1646).

17. *See, e.g.*, Spotswood's Treaty with Saponi, Stukanoe, Occaneechi, and Totero Indians, art. XI, February 27, 1714, *reprinted in* 4 EAID, *supra* note 15, at 220, 223 (requiring the annual payment of three arrows "as an acknowledgement of their dependance on the Crown of Great Britain").

nominal value.[18] By subjecting themselves to this ritual taxation, these tributary tribes demonstrated that they had become subject to the legislative authority of Virginia. The Virginia system distinguished between two types of tribes: tributary and non-tributary. The non-tributary tribes had no ongoing obligation to pay tribute and acknowledged no submission to the legislative will of Virginia.[19]

The rest of the colonies, with the exception of Massachusetts for a time, made no distinction between tributary and non-tributary tribes.[20] Instead, treaties tended to involve land cessions and the fixing of boundaries. In some cases, a tribe might have no territory left, in which case its political existence ended and its members joined other tribes[21] or assimilated into white society.[22] A survey of colonial taxes shows that colonial legislatures never attempted to tax the lands of tribes even though the lands were theoretically within the political boundary of the colony.[23] To the colonial inhabitants, non-taxation of Native Americans within their political boundaries made perfect sense because these Native Americans were not part of the colonial polity. The colonial boundaries were merely expansive claims based on charters from the British Crown. In practice, these tentative boundaries merely meant that the particular colony, to the exclusion of other colonies, had the right to deal with specific Native American tribes and acquire some or all of their lands through treaty.[24] Pennsylvania is a good example of this process. The royal charter to William Penn gave him territory roughly in the area of the current State of Pennsylvania.[25] This charter enabled him to begin dealing with the Native Americans in the region

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18. *See id.*

19. *See, e.g.*, Implementing the Treaty of 1722 with the Iroquois, Nov. 1, 1722, *reprinted in* 4 EAID, *supra* note 15, at 360 (discussing treaty with Iroquois, establishment of boundaries, and use of passports to control access between territories).

20. *See* ALAN TAYLOR, AMERICAN COLONIES 193–94 (2001) (describing the period from 1634 to 1664 when Puritan colonies extracted wampum payments as tribute from various tribes).

21. *See id.* at 202 (describing the departure of the Narragansett from southern New England to northern New England to join the Abenaki).

22. *See id.* at 203 (describing assimilation as a process in which the Native Americans were relegated to the lowest rungs of the social ladder and left to do menial jobs).

23. *See id.* at 146–48.

24. *See generally* EAID, *supra* note 15 (discussing the various colonial treaties negotiated between 1607 and 1789).

25. Charter for the Province of Pennsylvania, 1681, *available at* http://www.yale.edu/lawweb/avalon/states/pa01.htm#b1 (grant from Charles II to William Penn from the Delaware River westward by five degrees of longitude, which at that latitude is approximately 250 miles).

and to extinguish their title through treaties.[26] If the royal charter the British Crown had given him included complete ownership of the lands in a broad political sense, treaties with tribes and payment for their lands would have been unnecessary.

In the aftermath of a treaty, if a tribe retained territory within a colony, the tribe remained politically separate and continued to enjoy rights of self-government.[27] Indeed, the colonial treaties and the federal treaties that followed after the formation of the United States are ample proof that political separation was the solid, fundamental, and foundational legal paradigm describing the relationship of the colonies and the tribes. If tribes retained no right of self-government, then treaties would have been a nonsensical way to arrange political relationships. Instead, legislation would have been the way for a colony to assert its political authority over tribes. Colonies passed many laws involving Native Americans, but a review of these laws shows that they did not have extra-territorial effect.[28]

In summary, then, we see a clear picture of colonies not taxing tribes, their members, or activities taking place within Indian Country. Obviously, colonies viewed these lands and peoples as beyond their taxing power. The foregoing discussion might suggest that the seventeenth and eighteenth centuries were times of relative peace between white colonists and Native Americans in what is now the eastern part of the United States. Nothing could be further from the truth. Violent conflicts between whites and Native Americans occurred throughout this period.[29] For this reason, tribes were often on the move, and it was common for members of declining tribes to join stronger tribes.[30] Notably, colonies made no distinction between those Native Americans who had newly joined a tribe or who were residing with a

26. *See* TAYLOR, *supra* note 20, at 269 (describing William Penn's practice of dealing fairly with the Delaware Indians and paying a fair price for their lands before settlement by English immigrants).

27. *See, e.g.*, Articles of Agreement Between William Penn and the Susquehannah, Shawoneh and North Patomack Indians, Apr. 23, 1701, *reprinted in* 1 EAID, *supra* note 15, at 101 (leaving the affected tribes with "full and free privileges and Immunities of all the Said Lands").

28. *See generally* EAID, *supra* note 15 (no reference to state taxation of independent tribes); Library of Virginia, Colonial Tithables, Research Notes No. 17, http://www.lva.virginia.gov/whatwehave/tax/rn17_tithables.htm (last visited May 14, 2008) (explaining the assessment of tithes as a tax on households that included Native American servants, but not other Native Americans).

29. *See* JOHN TEBBEL & KEITH JENNISON, THE AMERICAN INDIAN WARS 1–130 (1960) (describing the various conflicts through the Revolutionary War).

30. *See, e.g.*, TAYLOR, *supra* note 20, at 200–03.

tribe on a temporary basis. All of them were viewed as beyond the reach of the colonial power to tax.

B. British Taxation

Each British American colony followed its own political structure based on its own unique history.[31] Nonetheless, Britain retained a broad claim of dominion over these colonies and their territories.[32] A part of this claimed dominion included the British power to tax activities within the colonies.[33] The colonists contested this power and asserted that the power to tax could come only from the people through their legislature.[34] British taxes in the American colonies, according to the colonists, were illegal because the legislative body enacting the taxes, the British Parliament, did not include representatives from the colonies.[35] This argument gave rise to the popular slogan: "No taxation without representation!"[36]

An interesting aspect of the British taxes was that they did not extend into Indian Country.[37] Although the British Crown claimed political dominion over the tribes and their territories through the discovery doctrine, the Crown's practice was to treat colonists as subjects and Native Americans as allies.[38] In modern times, we think of a subject owing allegiance and an ally owing support. We view an ally's refusal to make good on obligations under an alliance as bad form, whereas we think of a subject's active refusal as something close to treason. In the eighteenth century, then, the British Crown clearly viewed the colonists as within the scope of Parliament's power to tax.[39]

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31. *See* RICHARD MIDDLETON, COLONIAL AMERICA: A HISTORY, 1585–1776, at 49–242 (2d ed. 1996).

32. *See, e.g., id.* at 202–07 (describing the end of the proprietary system in the Carolinas).

33. *See id.* at 448 (describing British taxes imposed in 1733 and 1764 on commodities sold in the colonies).

34. *See id.* at 450–51.

35. *See id.*

36. *See id.* at 451.

37. *See id.* (describing the Stamp Act taxes as falling on legal documents, merchants posting bonds on cargoes, individuals receiving college degrees, farmers recording title to land, innkeepers seeking licenses, masters taking indentured servants, and printers publishing newspapers, almanacs, and pamphlets).

38. *See* FINTAN O'TOOLE, WHITE SAVAGE: WILLIAM JOHNSON AND THE INVENTION OF AMERICA 10–11 (2005) (describing the Mohawk Nation alliance with Britain against France in the context of a visit between Mohawk representatives and Queen Anne in London).

39. *See* TAYLOR, *supra* note 20, at 437–42 (describing the British Parliament's colonial taxes following the French and Indian War in the 1760s and the reaction of the colonists to

We may view Parliament's failure to tax activity within Indian Country as strong indirect evidence of political separation.

Further evidence of political separation between Britain and the tribes is the Royal Proclamation of 1763.[40] In the Proclamation, King George III declared a political separation between the colonies and Indian Country. This political boundary also reflected the view that the tribes, although within the British sphere of influence, remained independent.[41] The Crown's expectation was that the tribes would be loyal allies of the British. Such a concern was important because many of the tribes at that time had fought on the side of the French over British control of North America.[42]

From an imperial point of view, Britain also wanted to use the tribes as a force to contain the colonists along the Atlantic seaboard.[43] This strategy was designed to make sure that the colonists would remain dependent on British manufactured goods. British laws required that the goods be delivered in British ships.[44] This strategy also explains why the Royal Proclamation of 1763 made colonial access to tribal lands subject to Crown approval. If colonists could not move west, they would need to stay near the seaboard.

C. Confederation and the Early Federal Period

The preceding discussion of colonial and British treatment of tribes shows a clear picture of tribes as politically independent and beyond the taxing power of colonial legislatures or the British Parliament. Under the Articles of Confederation, responsibility over Indian affairs was confused.[45] The former colonies, now states, asserted that they acquired

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these taxes).

40. *See* Proclamation of 1763, Oct. 7, 1763, *reprinted in* 9 ENGLISH HISTORICAL DOCUMENTS, AMERICAN COLONIAL DOCUMENTS TO 1776, at 639 (Merrill Jensen ed., 1955) (reserving to the various Indian tribes lands that had not been ceded or purchased by the British Crown).

41. *See id.* (ensuring unmolested and undisturbed possession to "the several nations or tribes of Indians with whom we [the Crown] are connected").

42. *See* TAYLOR, *supra* note 20, at 428–37.

43. *See* MIDDLETON, *supra* note 31, at 446.

44. *See* Navigation Act of 1696, § 2 (Apr. 10, 1696), *reprinted in* ENGLISH HISTORICAL DOCUMENTS, *supra* note 40, at 359.

45. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 558–59 (1832) (Justice Marshall described how the practices of the Continental Congress and the ambiguity in the Articles of Confederation led to provisions in the United States Constitution that made it clear that control over Indian affairs was clearly in the hands of the federal government.).

full sovereignty over tribes within their boundaries.[46] Nonetheless, federal treaties were negotiated with tribes, and the Continental Congress regulated Indian affairs.[47] Notwithstanding this confusion, states did not attempt to impose taxes on those tribes having clear boundaries and continued the colonial and British imperial practice of not taxing Native Americans living on lands protected by treaty or occupied without prior dislocation or dispossession.[48] These tribes remained politically separate under a continuation of the colonial and British practices.

The question of federal taxation of tribes under the Articles of Confederation could not and did not arise because the federal government had no power to tax. Instead, the federal government could raise revenue only through a requisition system, by which the states imposed taxes and paid them to the federal government.[49] This system of raising federal revenue proved to be inadequate and was one of the more important reasons why the Constitutional Convention was convened in Philadelphia in 1787.[50]

Under the Articles of Confederation, it was unclear whether the federal government had power over territory outside the boundary of a state and within the territorial boundaries fixed by the Treaty of Paris[51] at the conclusion of the Revolutionary War.[52] These boundaries coincide roughly with the current United States boundaries from Maine to Georgia and west to the Mississippi, excluding Florida and most southern parts of Alabama and Mississippi.[53] The federal government could have argued that its claimed dominion over this territory, occupied primarily by Native Americans, allowed taxation of them. The federal government never made such a claim.

The absence of a federal effort to tax Native Americans and their lands at a time when the federal government faced bankruptcy[54] is very

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46. *See id.*

47. *See id.*

48. *See generally* EAID, *supra* note 15 (not noting any such taxes).

49. *See* ARTICLES OF CONFEDERATION art. VIII.

50. *See* T. HARRY WILLIAMS ET AL., A HISTORY OF THE UNITED STATES TO 1876, at 171 (1961) (explaining that one of the tasks of the Constitutional Convention was to provide the national government with a direct power to tax).

51. *See* Paris Peace Treaty of 1783, Sept. 3, 1783, art. 2, 8 Stat. 80 (describing the boundaries of the Unites States).

52. *See* ARTICLES OF CONFEDERATION art. IX (resolution of boundary disputes between and among states); *id.* art. XI (admission of new states).

53. *See* WILLIAMS ET AL., *supra* note 50, at 236.

54. *See id.* at 169 (explaining that the domestic debt of $34 million went unpaid but that

telling. Had the members of the Continental Congress believed that tribes, their members, and their lands were within a federal power to tax, they surely would have exercised such a power through the enactment of a taxing statute. Then, as now, the nonpayment of a lawfully imposed tax allows the taxing authority to seize the taxpayer's property to satisfy the tax.[55] Such a taxation regime would have been a much cheaper way of acquiring Indian lands than negotiating treaties and making payments. The members of the Continental Congress, however, had just fought a war with Britain and asserted that Parliament could not impose taxes on colonists because colonists had no elected members in Parliament. Under the new state governments (the former colonies) state taxation and voting tended to go hand in hand. Owners of property could vote, and their property was subject to taxation.[56] Those individuals who did not own property were viewed as paying little or no taxes and, therefore, generally could not vote. Taxation and political participation were strongly linked to each other.[57] To members of the Continental Congress, it would have been obviously unfair and illegal to tax Native Americans who maintained political separation from any states.

Shortly before the Constitutional Convention in Philadelphia, the Continental Congress passed the federal legislation creating the Northwest Territory and a structure and process for the creation of new states in the area now occupied by Ohio, Indiana, Illinois, Michigan, Wisconsin, and part of Minnesota.[58] The language of this statute, the Northwest Ordinance, makes reference to Native Americans, their lands, and their right of continued occupation.[59] The legal requirement of negotiating land cessions from tribes remained the exclusive way for gaining a right to possession of Indian lands. The government of the

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the interest payments on the foreign debt of $10 million were paid with requisitions from states and proceeds from land sales).

55. *See, e.g.*, I.R.C. § 6331(b) (2006) (giving the Secretary of the Treasury the power to seize and sell property after the taxpayer has been given notice of the liability and neglected to pay it).

56. *See* WILLIAMS ET AL., *supra* note 50, at 143.

57. *See id.* (noting that property ownership requirements were higher for those seeking elected office).

58. *See* Northwest Ordinance, July 13, 1787, 32 JOURNALS OF THE CONTINENTAL CONGRESS 334.

59. *See id.* at 340–41 ("The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorised by Congress . . . .").

Northwest Territory had a power to tax.[60] Notably, that power was never exercised over tribes or their lands within the territory. Instead, land cessions were negotiated through treaties.[61]

Regarding Indian affairs, the text of the Constitution added no apparent clarity other than to delete the problematic language in the Articles of Confederation that had suggested that states retained sole power to deal with tribes within their boundaries. This deletion was the basis for the now widely accepted principle that management of Indian affairs is exclusively a federal concern unless expressly modified by Congress.[62] In addition, the early and active federal administration of Indian affairs quickly made it clear that this was a federal concern in which the state had no formal legal role or power.[63] In these early years, states refrained from attempting to tax tribes, their lands, or people who were within tribal boundaries.

The status of tribes as politically separate and, therefore, beyond a state's power to tax is clearly reflected in the language of the Constitution that apportions representatives in Congress.[64] This provision determines the number of representatives that each state will have in the House of Representatives. The language of the clause embodies part of the Great Compromise between the northern and southern states over whether slaves were to be counted in determining proportional representation.[65] This clause also provides that "Indians not taxed" would not be counted in the census.[66] Given the treatment of tribes as politically separate, this phrase makes perfect sense and would have been understood quite well by the drafters of the Constitution. Many of the drafters had been involved in the Revolutionary War where the power of the British Parliament to impose taxes was disputed

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60. *See id.* at 341.

61. For a treaty negotiated under the Articles of Confederation, see Treaty of Jan. 9, 1789, art. II, 7 Stat. 28–29 (describing boundaries and land cessions; remainder of treaty deals with trade but does not mention power to tax). For a treaty negotiated under the new Constitution, see Treaty of Aug. 3, 1795, art. III, 7 Stat. 49, 49–50 (confirming boundaries and making land cessions; no mention of subjection of tribes to state, territorial, or federal taxation).

62. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) (explaining that the Constitution removed the ambiguity over the federal and state roles over Indian affairs).

63. *See, e.g.*, County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) (determining that the Oneida Nation had a valid land claim because New York's purported purchase of their land in 1795 violated a 1793 federal statute that required federal approval of all land transfers from Indian tribes).

64. U.S. CONST. art. I, § 2, cl. 3.

65. *See* WILLIAMS ET AL., *supra* note 50, at 176.

66. U.S. CONST. art. I, § 2, cl. 3.

because the colonists had no representation in that lawmaking body. The phrase "Indians not taxed" shows that the states did not view tribes or the Indian people within tribal boundaries as subject to state taxation. To the drafters it would have been obviously unfair and illegal to impose taxation on Indians who were not political members of the state. Indians who retained their residence with a tribe having political boundaries, even though such persons would have been physically present within a state, would not have been residents of it.

A review of early state tax laws shows no attempts to tax tribes. Many Indians living within Indian Country lived on tribal lands different from their own tribe.[67] States made no effort to single out these Indians as appropriate objects of state taxation. Instead, the states viewed Indian Country as a barrier to the exercise of state power. In fact, it was the acceptance of this view that led Georgia to take extreme measures and unilaterally try to extinguish the Cherokee Nation.

D. Worcester v. Georgia

The discussion thus far has provided an historical background that demonstrates why states found themselves within a well accepted legal paradigm in which tribes enjoyed political separation and, as a result, were beyond the taxing power of states. The 1832 case of *Worcester v. Georgia* is a United States Supreme Court case that accurately reflects, accepts, and incorporates this well-accepted legal paradigm.[68] Georgia took the clearly erroneous legal position that its sovereignty extended over the Cherokee Nation because the Cherokee Nation was located within the state's boundaries.[69] Georgia's position was entirely

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67. *See* MIDDLETON, *supra* note 31, at 353 (describing the intermixing of the Iroquois Nations during the late colonial period "so that some of the clans became so mixed as to have lost much of their racial distinctiveness").

68. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832). Justice John Marshall, regarding past practices, wrote:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians.

Id.

69. *See id.* at 557 ("The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states . . . .").

inconsistent with the well-accepted paradigm that tribes retained their sovereignty even though they found themselves within the political boundaries of British dominions, individual colonies, individual states, and a federal territory. Georgia's argument, on the surface, seemed logical. A state's legislative power should extend to all of the territory within its boundaries.[70] But Georgia's position was completely inconsistent with the long tradition of treaty-making that Georgia, both as a colony and as a state, had followed.[71] Ironically, it was the earlier treaty-making process that had ensured that the territorial integrity of Georgia would be respected by receiving land cessions and clear title to lands.[72]

In the early 1800s, the federal government of the United States had committed itself to extinguishing Indian title within Georgia.[73] The only legal method for extinguishing such title was through just war or through tribal consent expressed in a properly negotiated and legally ratified treaty.[74] Notwithstanding attempts by the federal government to negotiate a treaty for the removal of the Cherokee Nation to the west, the Cherokee Nation asserted, properly so, its right to retain its lands and its right of self-government.[75] This right of self-government existed

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70. Georgia did not actually represent itself in the Supreme Court proceeding under the theory that the Court had no jurisdiction over it. I infer from the actions of the Georgia legislature that it was asserting a territorial sovereignty.

71. Justice Marshall noted that Georgia's historical behavior was consistent with the paradigm of federal supremacy and political separation. *See Worcester*, 31 U.S. (6 Pet.) at 560.

72. *See, e.g.*, Treaty of June 16, 1802, 7 Stat. 68–70 (involving land cessions by the Creeks that benefited Georgia).

73. *See* PRUCHA, *supra* note 6, at 156 (describing an 1802 compact between the United States and Georgia, in which the federal government agreed to extinguish Indian title within Georgia in exchange for the state's release of its claims to western lands).

74. President Andrew Jackson contested this legal principle and asserted that the United States and Georgia had sufficient military strength to force their removal with or without the consent of the Cherokee, Creeks, Chickasaw, Choctaws, or Seminoles. *See* WILCOMB E. WASHBURN, THE INDIAN IN AMERICA 166 (1975).

75. *See Worcester*, 31 U.S. (6 Pet.) at 556–57 ("From the commencement of our government, [C]ongress has passed acts . . . which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts . . . consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States."). Henry Knox, serving as Secretary of War in George Washington's administration stated the proposition quite succinctly:

> The Indians being the prior occupants, possess the right of the soil. It cannot be taken from them unless by their free consent, or by the right of conquest in case of a just war. To dispossess them on any other principle,

even though the Cherokee Nation found itself within the United States and within the State of Georgia.[76] Georgia, primarily because of the opportunity for its white citizens to make large profits from Cherokee lands, decided to reject the predominant legal paradigm and to pass legislation making the political existence of the Cherokee Nation impossible.[77] Georgia hoped to drive the Cherokee Nation out of existence and to drive its people out of the state.[78]

The Georgia legislation was passed in December 1830.[79] It was the provision in the Georgia statute requiring white persons to apply for and receive a permit to enter the territory of the Cherokee Nation that Samuel Worcester violated.[80] Georgia arrested, charged, and prosecuted Worcester for violating the state statute.[81] A Georgia jury convicted him, and a Georgia judge sentenced him to four years' hard labor.[82] Worcester appealed his conviction to the United States Supreme Court, and Justice Marshall, writing for the Court, found that Georgia law stopped at the boundary of the Cherokee Nation.[83] The holding in *Worcester v. Georgia* clearly validated the dominant legal paradigm that tribes were politically separate from states.

The rule of law, however, often does not receive the honor and obedience that it deserves. Georgia ignored the ruling of the Supreme Court and did not release Worcester until the Cherokee Nation agreed to removal.[84] President Andrew Jackson, whose political fortunes depended on a populist platform that subverted tribal sovereignty, openly challenged Justice Marshall to enforce his Court's ruling.[85] President Jackson ensured his reelection in 1832 by adopting a pro-

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> would be a gross violation of the fundamental laws of nature, and of that distributive justice which is the glory of a nation.

REPORT FROM HENRY KNOX RELATIVE TO THE NORTHWESTERN INDIANS, JUNE 15, 1789, *reprinted in* 4 AMERICAN STATE PAPERS: INDIAN AFFAIRS 12, 13 (1832).

76. *See Worcester*, 31 U.S. (6 Pet.) at 556–57.

77. *See* ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 104–09 (1970).

78. *See id.* at 105 ("The Georgia Guard was composed of ruffians, who terrorized the Cherokees—putting them in chains, tying them to trees and whipping them, throwing them into filthy jails.").

79. *See id.* at 104–05.

80. *See Worcester*, 31 U.S. (6 Pet.) at 539–40.

81. *See id.* at 540.

82. *See id.* at 562.

83. *See id.* at 561.

84. *See* DEBO, *supra* note 77, at 105–06.

85. *See id.*

Georgia and an anti-Cherokee position.[86] Jackson, a lawyer himself, understood the legal paradigm and the rule of law and had negotiated treaties on behalf of the United States while he served in the military.[87] Nonetheless, Jackson refused to lift a finger to free Worcester and left him in prison as a grim reminder to the Cherokee Nation that their legal rights, enshrined in treaties and given legal supremacy over Georgia through the U.S. Constitution, were of little value when political leaders lacked the moral integrity to obey the rule of law and enforce the mandates of the Constitution.[88] Andrew Jackson knew that Indians could not vote and, therefore, made the expedient and politically self-interested decision.

President Jackson's inaction is a national embarrassment. The decision of *Worcester v. Georgia*, however, is an opinion of the United States Supreme Court and is, therefore, an authoritative and legally binding principle of law. Quite simply, then, *Worcester v. Georgia* means that a state's political power stops at the reservation boundary of a tribe. Accordingly, a corollary of this principle is that a state's power to tax, as one of its political powers, does not extend across a tribal boundary. Indeed, Georgia's legislation did not attempt to tax activity within the Cherokee Nation.

The lawless actions of Georgia and the depredations of its citizens within the territory of the Cherokee Nation ultimately compelled the Cherokee to accept the Jackson administration's offer of lands west of the Mississippi.[89] This was part of Jackson's removal policy designed to put geographical distance between the whites in Georgia, Alabama, Florida, and Mississippi, and the Indians that formerly occupied these lands. Jackson justified this policy as a way of saving Native Americans in this region from extinction.[90] Quite ironically, Jackson effectuated his removal policy through treaties.[91] By modern standards, many of these treaties are of dubious validity because of fraud and duress.[92] Some did

86. *See* WILLIAMS ET AL., *supra* note 50, at 370 (explaining the support that Jackson received from the southern states by pursuing his removal policy).

87. *See, e.g.*, Treaty with the Cherokees, Sept. 14, 1816, 7 Stat. 148, 148–49 (Andrew Jackson was one of the commissioners who signed the treaty.).

88. *See* DEBO, *supra* note 77, at 106 (quoting a Cherokee leader predicting Jackson's treachery and describing Jackson as a "Chicken Snake").

89. *See id.* at 106–07.

90. *See* President Andrew Jackson on Indian Removal, Seventh Annual Message, Dec. 7, 1835, *reprinted in* 4 MESSAGES AND PAPERS OF THE PRESIDENTS 1366, 1390–92 (James D. Richardson ed., 1897).

91. *See* PRUCHA, *supra* note 6, at 168–82.

92. *See id.*

not even receive Senate ratification, and some were renegotiated because of questions over validity.[93]

In any case, Jackson's use of treaties shows that he ultimately conceded that tribes enjoyed political separation. His proclamation and his office appeared on treaties that promised to preserve tribal sovereignty.[94] In addition, neither Jackson nor Congress during his two terms ever attempted to impose any taxes on tribes or their lands. Ultimately, Jackson, although he scorned the holding in *Worcester v. Georgia*, actually followed the legal paradigm and did not repudiate it. Unfortunately, it was his refusal to enforce the law of the United States in the first instance that forced the Cherokee Nation and the other southeastern tribes to accept Jackson's deal and move to the Indian Territory. And it was the treaty process that made the removal process "legal" because it was within the accepted legal paradigm.

E. The Confederate Constitution

In 1861, when the Southern States seceded from the Union, they adopted a constitution. Modeled after the Federal Constitution, the Confederate Constitution contained a clause determining the number of representatives from each state to serve in the House of Representatives. The Confederate Constitution included a provision that apportioned these representatives among the states based on population. In counting the population of a state, "Indians not taxed" were to be excluded.[95] This provision shows that the dominant legal paradigm of political separation for tribes continued in the Confederacy. Very little Indian Country remained in the Southern States because the Jacksonian removal doctrine had been vigorously pursued.[96] However, a few areas of Indian Country did remain in Alabama, Mississippi, Arkansas, and Texas.[97] Even for these small remnants, political separation remained the norm—a norm so strong that the text in the

93. *See id.*

94. *See, e.g.*, Treaty of Oct. 20, 1832, 7 Stat. 381 (signed by General John Coffee, who was authorized by the President and proclaimed by the President on March 1, 1833). In particular, see article IV of the treaty, which states that "the United States will guaranty to the Chickasaw nation, the quiet possession and uninterrupted use of the said reserved tracts of land, so long as they may live on and occupy the same." *Id.* at 383.

95. *See* CONST. OF CONFEDERATE STATES art. I, § 2, cl. 3 (Feb. 28, 1861), *reprinted in* 1 JOURNAL OF THE CONGRESS OF THE CONFEDERATE STATES OF AMERICA 851 (1904).

96. *See* DEBO, *supra* note 77, at 104–09.

97. *See, e.g.*, Clara Sue Kidwell, *The Choctaw Struggle for Land and Identity in Mississippi, 1830–1918*, *in* AFTER REMOVAL: THE CHOCTAW IN MISSISSIPPI 64 (Samuel J. Wells & Roseanna Tubby eds., 1986).

Confederate Constitution repeated it. No Confederate states attempted to tax tribes or activities within tribal boundaries. The absence of taxation in Indian Country is telling. The Civil War created a dire need for government revenue, yet the Confederate States did not look to tribes for revenue. This shows the strength of the dominant legal paradigm of political separation and immunity from state taxation.

F. Early State Attempts to Tax Tribes

Right after the Civil War, two cases reached the United States Supreme Court and involved state attempts to impose property taxes on Indians' lands. The first case, *The Kansas Indians*,[98] involved the attempt of Johnson County, Kansas, to impose property taxes on the lands belonging to a member of the Shawnee Tribe. This member, named Blue Jacket, held the property under an allotment that was provided in an 1854 treaty[99] negotiated between the Shawnee Tribe and the United States.[100] Under the treaty, the tribal lands were divided into allotted lands and surplus lands.[101] The allotted lands were to be owned by individual members of the tribe subject to protective restrictions.[102] The restrictions were designed to protect the tribal member from the fraudulent practices of whites who often preyed on Native Americans to acquire title to their lands.[103] The surplus lands were to be held for five years to allow tribal members who had been separated from the tribe to select lands under the allotment provisions.[104] Any unclaimed lands were then to be sold and the proceeds held for the benefit of the tribe.[105]

Johnson County conceded that it could not tax any lands held in common, but it claimed that it could tax those lands owned by individual members, like Blue Jacket.[106] Essentially, the County was arguing that these lands owned by individual members ceased to be tribal lands and should be treated like any other lands owned by residents within Johnson County. The Supreme Court, however, disagreed, and concluded that the allotment process undertaken pursuant to the 1854 treaty did not disestablish the tribe or its relationship with the federal

98. 72 U.S. (5 Wall.) 737 (1866).
99. *See* Treaty with the Shawnees, May 10, 1854, 10 Stat. 1053.
100. *See The Kansas Indians*, 72 U.S. (5 Wall.) at 753.
101. *See* Treaty with the Shawnees, *supra* note 99, art. 2, at 1054–55.
102. *See The Kansas Indians*, 72 U.S. (5 Wall.) at 753.
103. For an example of such practices in Oklahoma, see DEBO, *supra* note 77, at 268–83.
104. *See* Treaty with the Shawnees, *supra* note 99, art. 2, at 1054–55.
105. *See id.*
106. *The Kansas Indians*, 72 U.S. (5 Wall.) at 755.

government.[107] In language evoking the holding in *Worcester v. Georgia*, the Court stated that "[a]s long as the United States recognizes [the Shawnee Tribe's] 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."[108] Accordingly, *The Kansas Indians* case validates the political separation paradigm and affirms that this separation preempts the state power to tax lands even when held individually (not in common) in the form of allotments.

The second case, *The New York Indians*, was issued ten days after *The Kansas Indians* case and involved the question of the state power to tax Indian lands.[109] In the New York case, the New York legislature directly imposed a highway tax on the reservation lands on the assumption that a treaty and deed had extinguished Indian title and converted the lands into non-Indian lands.[110] The confusion arose because an 1838 treaty permitted the transfer of fee title immediately but permitted the members of the Seneca Nation to occupy the reservation lands for an additional five years. Difficulties arose between the tribe and the purchasers. A new treaty was entered into in 1842, before the expiration of the five-year term in the 1838 treaty.[111] The new treaty reinstated the tribe's right to possession of the two reservations.[112] The treaty also provided for the sale of the lands of two other reservations of the tribe.[113] New York assessed taxes, declared them unpaid and delinquent, then sold most of the lands of three of the reservations in 1859.[114] The Court reduced these transactional complexities into a simple rule: "Until the Indians have sold their lands, and removed from them in pursuance of the treaty stipulations, they are to be regarded as still in their ancient possessions, and are in under their original rights, and entitled to the undisturbed enjoyment of them."[115] This meant that the mere transfer of legal title, without extinguishing the rights of possession, left the Seneca Nation politically separate and

107. *See id.* at 755–56.

108. *Id.* at 757.

109. *See* The New York Indians, 72 U.S. (5 Wall.) 761 (1866).

110. *See id.* at 767 ("[I]t was doubtless assumed [by New York] . . . that the whole title being in the grantees, the State, notwithstanding the possession of the Indians, might enter upon the reservations in the exercise of its internal police powers, and deal with them as with any other portion of its territory.").

111. *See id.*

112. *See id.*

113. *See id.*

114. *See id.* at 764.

115. *See id.*

immune from state taxation.

Two important points come from these cases. First, the attempts at taxation by Kansas and New York occurred only because each state believed that the tribes involved no longer existed as separate political entities. Both states argued this point and lost on the factual question of whether the tribes continued to have a political existence. Because the tribes still existed, the state could not tax their lands. Put another way, the state power to tax stopped at the political boundary of the tribe. In essence, both Kansas and New York were conceding that their powers did not extend across tribal boundaries. In their particular cases, however, the states were asserting that the boundaries had been extinguished by treaties.

The other important point of these two tax cases is that the United States Supreme Court continued to apply *Worcester v. Georgia* and did so in the context of taxation. These two tax cases, then, affirmed the rule of federal law that states could not impose their taxes within Indian Country until treaties removed the barrier. A few years later, Congress ended treaty-making with tribes,[116] but the executive branch of the government continued to execute agreements with tribes.[117] Congress ratified these agreements through subsequent legislation and appropriations.[118] The statute that eliminated treaty-making validated the legal obligations of all the previously ratified treaties with Indian tribes.[119] Obviously, the politically separate character of tribes remained even after Congress removed the President's power to negotiate treaties with tribes.[120]

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116. *See* Act of March 3, 1871, ch. CXX, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (2006)).

117. *See* PRUCHA, *supra* note 6, at 313–26 (describing the use of agreements as treaty substitutes from 1872 until 1911).

118. *See, e.g.*, Act of April 21, 1904, ch. 1402, 33 Stat. 189, 194–96 (adopting an agreement between the United States and the Turtle Mountain Band of Chippewa Indians).

119. *See* 25 U.S.C. § 71 (providing that "no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired").

120. My own view is that Congress did not have the power to eliminate the President's power to negotiate treaties with tribes. The treaty power expressed in Article II of the United States Constitution is general and does not specifically refer to agreement with Indian tribes. Nonetheless, the United States negotiated treaties with tribes under the Articles of Confederation, and George Washington negotiated treaties with Indian tribes shortly after taking office. The treaties and their ratification by the Senate attracted no known negative comment from the drafters of the Constitution. Moreover, George Washington was the presiding official at the Constitutional Convention and, therefore, was well-positioned to understand that the general treaty power granted to the executive included the power to

G. The Fourteenth Amendment

With the adoption of the Thirteenth Amendment to the United States Constitution, slavery was eliminated. The Fourteenth Amendment was part of the constitutional restructuring of the United States that became necessary with the elimination of slavery. A key change was the method for apportioning each state's share of elected members to the House of Representatives. As originally adopted, the Constitution granted each state a number of representatives based on its size according to population.[121] The impasse at the Constitutional Convention was over whether to count slaves, which led to a compromise in which slaves were counted as three-fifths of a person. The Northern States had proposed that slaves not be counted at all. The Southern States proposed that slaves be counted the same as all other persons. The three-fifths rule, which was coupled with a rule on the apportionment of direct taxes imposed by the federal government, became known as the "Great Compromise."[122]

With the abolition of slavery and the intended treatment of former slaves as regular citizens, the three-fifths rule no longer made any sense. Accordingly, the Fourteenth Amendment changed this so that all individuals would be counted in the census that determined each state's share of members in the House of Representatives.[123] For our purposes, there is a big exception. The Fourteenth Amendment reiterated the rule that "Indians not taxed" would not be counted in the census for this

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negotiate treaties with the Indian tribes. Under my view, the President is still free to negotiate treaties with Indian tribes. To be valid such treaties would require Senate ratification. If a particular treaty required an appropriation, then the House of Representatives could block its implementation by withholding funding. As things now stand, all three branches of government have lived without treaties since 1871, and it is unlikely that any President would attempt to revive a power that was taken away unconstitutionally by Congress.

121. See U.S. CONST. art. I, § 2, cl. 3, which provided that

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

122. *See* SAMUEL ELIOT MORISON ET AL., A CONCISE HISTORY OF THE AMERICAN REPUBLIC 115–16 (1977).

123. *See* Scott A. Taylor, *State Property Taxation of Tribal Fee Lands Located Within Reservation Boundaries: Reconsidering* County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation *and* Leech Lake Band of Chippewa Indians v. Cass County, 23 AM. INDIAN L. REV. 55, 61–62 (1998).

purpose.[124] Therefore, a state such as Kansas, which might have 10,000 Native Americans living on reservation lands and treated as beyond the power of state taxation, would not have these 10,000 individuals counted in the federal census. The federal census takers during the nineteenth century carefully followed this rule and excluded Native Americans living within reservations or federally recognized Indian communities when taking each census.[125]

The continuation of the "Indians not taxed" rule in the Fourteenth Amendment makes perfect historical sense. Congress took up and debated the Fourteenth Amendment in 1866, just one year before the Supreme Court decided *The Kansas Indians* and *The New York Indians* cases discussed above.[126] Enough state legislatures had ratified the Fourteenth Amendment when South Carolina approved it on July 9, 1868, and it was certified as adopted by the Secretary of State on July 28, 1868.[127] Those two cases reconfirmed the well-established rule that Native Americans who retained their political identity within a state are beyond the state's power to tax. The time frame during which the state considered the Fourteenth Amendment bracketed the dates of decision in the Kansas and New York cases.

This legal principle was obvious to the members of Congress who voted for the Fourteenth Amendment and explains the clause's inclusion. We may assume that the phrase "Indians not taxed" retained its well-understood meaning: tribes retaining a political existence were beyond the reach of federal and state taxation. Before proposing the Fourteenth Amendment to the states, Congress passed the Civil Rights Bill of 1866.[128] The bill as reported from the Judiciary Committee did not include the phrase "Indians not taxed." Proponents of the measure indicated that they did not intend to make Native Americans citizens if they retained tribal relations.[129]

It was common knowledge, at least to those federal officials

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124. U.S. CONST. amend. XIV, § 2.

125. *See generally* CENSUS OFFICE, DEP'T OF THE INTERIOR, REPORT ON INDIANS TAXED AND INDIANS NOT TAXED IN THE UNITED STATES (EXCEPT ALASKA) AT THE ELEVENTH CENSUS: 1890 (1894).

126. *See* CONSTITUTION OF THE UNITED STATES OF AMERICA AS AMENDED, H.R. DOC. NO. 108-95, at 17 (2003) (notes on proposal and ratification).

127. *See id.*

128. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27.

129. *See* Method of Determining "Indians Not Taxed," Op. Dep't of Interior M-31039 (1940), *reprinted in* 1 OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR RELATING TO INDIAN AFFAIRS 1917–1974, at 990–91 (1940).

administering federal Indian policy and to others in proximity to Indian Country, that many reservations contained Native Americans from other tribes.[130] In addition, federal Indian policy often forced different tribes to consolidate on a single reservation.[131] Given this known and substantial intermixing, we find no efforts on the part of states to impose their taxes on Indians of one tribe living on the reservation of another tribe. Those efforts would not come until a hundred years later when the passage of time caused judges to forget that the phrase "Indians not taxed" had any continuing legal significance.

H. New States and Enabling Legislation

Not long after the passage of the Fourteenth Amendment, Congress began the practice of ensuring that states would not attempt to assert broad taxing powers over Indian Country. We must remember that the principal source of tax revenues for states during the nineteenth century was the property tax.[132] If large Indian reservations were within a state, then that state would naturally want to tax Indian lands to augment its tax base. In addition, taxation could be used as a tool of dispossession. Delinquent taxes could be used to justify tax sales and to extinguish the title of the owner.[133] The historical case is clear. If and when states tax Indian lands, then Indian title for Indian lands often ends up being extinguished through tax sales.[134] More often than not, Indian lands were purchased at tax sales for pennies on the dollar.[135] Given this

130. *See, e.g.*, Treaty of May 7, 1868, art. II, 15 Stat. 649, 650 (setting the boundaries of the reservation of the Crow Tribe for the exclusive use of the tribe plus "such other friendly tribes or individual Indians as from time to time they may be willing . . . to admit amongst them").

131. *See, e.g.*, Confederated Tribes of Grand Ronde, Ntsayka Ikanum: Our Story, http://www.grandronde.org/culture/# (last visited May 14, 2008) (telling the story of the consolidation of many tribes into the Confederated Tribes of Grand Ronde).

132. *See* Randall J. Gingiss, *Forcing Fairness in State Taxation*, 33 OHIO N.U. L. REV. 41, 44 (2007) (noting that as late as 1890, the property tax provided seventy-two percent of all state tax revenue and ninety-two percent of all local tax revenues).

133. *See, e.g.*, The New York Indians, 72 U.S. (5 Wall.) 761 (1866) (Non-payment of property taxes led to a tax sale to recover the unpaid taxes on lands where the right to possession belonged to the Oneida Tribe.); Pennock v. Comm'rs, 103 U.S. 44, 44 (1880) (Tribal lands granted to Native American without restrictions were lost in a tax sale.).

134. *See* United States v. Mitchell, 445 U.S. 535, 543–44 (1980) (discussing amendments to the General Allotment Act and the intent of Congress to protect allotted Indian lands from state property taxation so that the land would not be lost through tax sales).

135. Tax sales can provide a windfall for the purchaser because a state taxing authority will accept the amount of unpaid taxes, which is almost always just a fraction of the fair market value of the property. In general, property taxes are imposed at about one to two percent of the fair market value of the land. For property tax purposes, the fair market value

pernicious practice of state taxing authorities, federal protection was more than justified.[136]

The protection came in the form of federal legislation that prohibited state taxation and that also required states to adopt measures in their constitutions that would prohibit state taxation of Indian lands.[137] Protective federal legislation is contained in the statutes that enabled the formation of many of the western states, including Arizona, Idaho, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Washington, and Wyoming.[138] It is appropriate to ask why Congress would pass a federal statute prohibiting state taxation and also require the same prohibition in the new state's constitution. Obviously, the federal law, because of the Supremacy Clause, would have been a sufficient legal bar. It is safe for us to surmise that the threat of state taxation was so likely and substantial that Congress decided that a double barrel approach was necessary. Perhaps the thinking was that an explicit rule in a state constitution would operate as a blinking neon light: "Don't tax Indian lands! Don't tax Indian lands!" These provisions remain in the constitutions of these states, yet few legislators in those states are aware of them and very few understand that the admission of their state to the Union was conditioned on the promise that their state would not tax Indian lands.

State taxing authorities, however, read these provisions very narrowly.[139] The prohibition does not mention such taxes as income

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of the land is often underestimated. So even if a purchaser in a tax sale has to pay ten years worth of accumulated taxes, the amount seldom will be over twenty percent of the property's fair market value.

136. The reader should know that during this same period, federal officials were doing an abysmal job in protecting Native Americans receiving allotted lands. *See* DEBO, *supra* note 77, at 251–67 (describing the many methods used to defraud Native Americans of ownership of former tribal lands transferred to them under the federal allotment system).

137. *See, e.g.*, Act of June 20, 1910, ch. 310, § 2, 36 Stat. 557, 558–59 (enabling statute for New Mexico that prohibited state taxation of Indian lands until Congress allowed such taxation); N.M. CONST. art. 21, § 2 (prohibiting New Mexico from taxing Indian lands until allowed to do so by an act of Congress).

138. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 255–56 nn.17, 19 (1942).

139. *See, e.g.*, McClanahan v. State Tax Comm'n, 484 P.2d 221, 224 (Ariz. Ct. App. 1971) (stating that "[b]ecause of the nature of a net income tax we are not persuaded by the reasoning of those cases dealing with the attempt by the state to control or affect Indian real property"). Not surprisingly, the Arizona Court of Appeals did not cite to Arizona's constitution or the federal enabling legislation. The court also failed to explain that states did not then use income taxes and that it would have required uncharacteristic foresight for Congress to have provided an explicit exemption for Arizona's not yet enacted income tax in the Arizona enabling legislation that Congress passed in 1910. *See* Act of June 20, 1910, § 20,

taxes, payroll taxes, severance taxes, telecommunications taxes, sales taxes, or a multitude of other taxes. Of course, most of these taxes did not exist at the time.[140] To be fair, Congress did not and could not anticipate that these new taxes might be used as a way to get around the prohibition. In addition, Congress did not think that Indian tribes, as separate political entities, would be in existence very much longer. In fact, the text of these restrictions anticipated that such prohibitions might be lifted in the future by federal legislation. That was the plan at the time. Congress had begun what we call the allotment process—the "final solution" to the "Indian question."

I. Allotment

In the preceding sentence I use the words "final solution"[141] and "Indian question"[142] to express my own sense of moral outrage over this

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36 Stat. at 569–70 (prohibiting Arizona from taxing Indian lands).

140. *See generally* ALZADA COMSTOCK, STATE TAXATION OF PERSONAL INCOMES (1921) (showing that states relied primarily on various forms of property taxation for the bulk of their revenues during the nineteenth century).

141. U.S. DEP'T OF THE INTERIOR, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 5 (1905) [hereinafter COMMISSIONER'S REPORT OF 1905]. Commissioner Francis E. Leupp stated:

> Some one has styled this a policy of shrinkage, because every Indian whose name is stricken from a tribal roll by virtue of his emancipation reduces the dimensions of our red-race problem by a fraction—very small, it may be, but not negligible. If we can thus gradually watch our body of dependent Indians shrink, even by one member at a time, we may congratulate ourselves that the *final solution* is indeed only a question of a few years.

Id. at 5 (emphasis added).

142. U.S. DEP'T OF THE INTERIOR, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 30 (1906) [hereinafter COMMISSIONER'S REPORT OF 1906]. Commissioner Francis E. Leupp stated:

> The legislation of recent years shows conclusively that the country is demanding an end of the *Indian question*, and it is right. The Burke law, wisely administered, will accomplish more in this direction than any other single factor developed in a generation of progress. When it is supplemented by other legislation which will enable their pro rata shares of the tribal moneys to be paid, principal and interest, to competent Indians, the beginning of the end will be at hand. Such Indians, owning their land in fee, and receiving their portions of the tribal property without restriction, can not by any course of action maintain a claim for further consideration. Thru such measures the grand total of the nation's wards will be diminished daily and at a growing ratio.

Id. at 30 (emphasis added).

very dark period in the history of federal Indian policy. It is appropriate for me to use these shocking words because they are the words used by Francis E. Leupp, then Commissioner of Indian Affairs, to describe what he viewed as the beneficial consequences of the allotment process.[143] For many of us who write about Indian law, the allotment period was an unqualified failure in federal Indian policy.[144] No mass exterminations of people occurred, but tens of thousands of Native Americans found themselves effectively robbed of their lands by a legal model allegedly designed to help them.

For those unfamiliar with allotment and the underlying legislation, let me provide a brief overview. It was the widely held, but erroneous, view of federal officials during the entire nineteenth century that the poverty of Indians resulted from their inability to appreciate and embrace the benefits of private property and understand how agriculture, through hard work, could enrich a person and that person's family.[145] These officials viewed Native Americans as primitive hunter-gatherers devoid of Christianity and civilization.[146] These officials believed that the cornerstone of civilization was private property.[147] They also believed that Native Americans had no conception of private property.[148] Federal policy documents clearly and painfully reflect these

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143. For a full description of his views on the "Indian problem," see generally FRANCIS E. LEUPP, THE INDIAN AND HIS PROBLEM (photo. reprint 1971) (1910) (alternating doses of derisive racism and descriptions of the American Indian as a heroic figure).

144. *See* DEBO, *supra* note 77, at 251–67 (describing the fraud, lies, deceit, and massive dispossession that occurred through the allotment process).

145. *See* COMMISSIONER'S REPORT OF 1906, *supra* note 142, at 30.

146. *See, e.g.*, U.S. DEP'T OF THE INTERIOR, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 4 (1902). Commissioner William A. Jones stated:

> Born a savage and raised in an atmosphere of superstition and ignorance, [the American Indian] lacks at the outset those advantages which are inherited by his white brother and enjoyed from the cradle. His moral character has yet to be formed. If he is to rise from his low estate the germs of a nobler existence must be implanted in him and cultivated. He must be taught to lay aside his savage customs like a garment and take upon himself the habits of civilized life.
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> In a word, the primary object of a white school is to educate the mind; the primary essential of Indian education is to enlighten the soul.

Id.

147. *See* LEUPP, *supra* note 143, at 27 (indicating that communal ownership of land was "fatal to all legitimate enterprise").

148. *See, e.g.*, Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1571–94 (2001) (explaining some of the many property systems that different groups of Native Americans used).

blatantly racist points of view.[149]

The historical record is another matter. It is accurate to say that before Europeans arrived intensive agriculture was common among Native Americans in most regions in North America where soil and climate supported it.[150] The ever-expanding archeological record shows widespread and intensive use of sophisticated agriculture.[151] In addition, virtually all narratives of early contact make this conclusion clear. In regions where agriculture was not a prudent way to make a living, Native Americans relied heavily on fishing, hunting, gathering, and forms of horticulture.[152] This was true in Europe as well. So, for example, fishing was a common subsistence and commercial activity in Europe.[153]

Where we have firsthand European accounts, we discover that Native Americans employed property systems that delineated and determined individual rights and access to resources.[154] It is entirely accurate to say that Native American property systems were vastly different from British notions of property. Nonetheless, one can see similarities and differences that are explained by history, circumstance, and environment. As time passed, agriculture for Native Americans changed substantially as European-induced dislocations made

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149. *See, e.g.*, COMMISSIONER'S REPORT OF 1905, *supra* note 141, at 1.

> The commonest mistake made by his white wellwishers in dealing with the Indian is the assumption that he is simply a white man with a red skin. The next commonest is the assumption that because he is a non-Caucasian he is to be classed indiscriminately with other non-Caucasians, like the negro, for instance. The truth is that the Indian has as distinct an individuality as any type of man who ever lived, and he will never be judged aright till we learn to measure him by his own standards, as we whites would wish to be measured if some more powerful race were to usurp dominion over us.

Id.

150. *See* CHARLES C. MANN, 1491: NEW REVELATIONS OF THE AMERICAS BEFORE COLUMBUS chs. 1, 6, 10 (2005).

151. *See id.*

152. *See id.*

153. *See* MARK KURLANSKY, COD: A BIOGRAPHY OF THE FISH THAT CHANGED THE WORLD 1–14 (1997).

154. *See, e.g.*, 1 TRAVELS AND WORKS OF CAPTAIN JOHN SMITH: PRESIDENT OF VIRGINIA, AND ADMIRAL OF NEW ENGLAND 1580–1631, at 79–81 (Edward Arber ed., 1910) (including a brief description of the property system of the Powhatan Confederacy stating that tribal members "knowe their severall landes, and habitations, and limits to fish, fowle, or hunt in [sic]").

indigenous forms of agriculture more difficult.[155] Native Americans continued to grow crops where and when they could. In addition, Native Americans adopted some European agricultural and horticultural practices, just as Europeans adopted Native American domesticated plants. In fact, some have estimated that sixty percent of the domesticated plant species in cultivation around the world come from the Americas.[156] The single largest world crop by tonnage is maize.[157] The story that the indigenous peoples of North America were not agriculturalists[158] is just flatly untrue.[159]

On the European to Native North American transmission side, the breeding and trading of horses became very successful activities for some tribes. Cash crops, such as cotton and tobacco, were raised by some Native Americans.[160] Many European farm animals became part of the horticultural pattern for numerous tribes.[161]

The nineteenth century myth that Native Americans were roaming forest-dwellers who lived by hunting the animals they found there comes from the importance of the fur trade to Europeans. Beginning in the sixteenth century, European fishermen began trading goods for furs and pelts with Native Americans in the area of Newfoundland.[162] This quickly became a very lucrative trade that induced many Native

155. *Compare* THOMAS JEFFERSON WERTENBAKER, THE FIRST AMERICANS 1607–1690, at 307–11 (1929) (describing Native Americans as savages knowing little or nothing about agriculture), *with* DEBO, *supra* note 77, at 112 (describing many of the Native Americans living in the Indian Territory (later Oklahoma) as farming and living "in the same manner as the frontier white people of their day").

156. *See* MANN, *supra* note 150, at 177 ("One writer has estimated that Indians developed three-fifths of the crops now in cultivation, most of them in Mesoamerica.").

157. *See* U.S. DEP'T OF AGRIC., GRAIN: WORLD MARKETS AND TRADE (2006), *available at* http://www.fas.usda.gov/grain/circular/2006/09-06/grain0906.pdf (showing that world production of corn by metric ton exceeds that of wheat and rice).

158. *See, e.g.*, Bruce D. Smith, *Eastern North America as an Independent Center of Plant Domestication*, 103 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES 12,223 (2006) (presenting evidence about the indigenous domestication of plants in eastern North America, including squash and sunflowers).

159. *See* TAYLOR, *supra* note 20, at 45–46 (concluding that the great European expansion and increase in population started after 1492 because of increased food production achieved by European adoption of new world crops).

160. *See, e.g.*, The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 617 (1870) (The background facts involved the growing, manufacturing, and sale of substantial amounts of tobacco in the Cherokee Nation by members of the tribe.).

161. *See, e.g.*, CLYDE KLUCKHOHN & DOROTHEA LEIGHTON, THE NAVAHO 35 (rev. ed. 1974) (noting Spanish reports indicating agriculture and the commercial exploitation of sheep, goats, horses, and cattle, all of which were of European origin brought by the Spanish).

162. *See* TAYLOR, *supra* note 20, at 92.

Americans to spend substantial amounts of time trapping fur-bearing animals to trade for European goods.[163] This trade, which was of substantial importance to the British, Dutch, French, and Spanish, spread throughout vast reaches of North America, lasted for three centuries, and remained commercially important through the middle of the nineteenth century.[164] For those tribes engaged in the fur trade, agriculture remained important when climate, soil, and circumstances permitted.[165]

Many European and American narratives dealing with conflicts between whites and Native Americans repeatedly tell how Indian crops were destroyed as a routine part of warfare.[166] These narratives refute the myth that Native Americans had no agriculture. Disputes between Native Americans and colonists in Virginia and Massachusetts frequently arose because the colonists' pigs and cattle were not fenced in and would eat the crops planted by Native Americans.[167] Nineteenth-century federal officials were blind to this obvious history and to the

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163. *See* 1 PAUL CHRISLER PHILLIPS, THE FUR TRADE 15–22 (1961) (providing a sketch of the rise of the fur and pelt trade in North America).

164. *See* WILLIAM E. FOLEY & C. DAVID RICE, THE FIRST CHOUTEAUS: RIVER BARONS OF EARLY ST. LOUIS 72–84 (1983) (describing the 1790s fur trade of the Chouteau family along the Missouri River); PETER C. NEWMAN, 1 COMPANY OF ADVENTURERS 41–59 (1985) (explaining the economic value of the fur and pelt trade in far northern North America); DAVID SINCLAIR, DYNASTY: THE ASTORS AND THEIR TIMES 102–12 (1983) (describing the founding and success of the American Fur Company during the early 1800s). *See generally* PHILLIPS, *supra* note 163.

165. *See* TAYLOR, *supra* note 20, at 400 (explaining the use of agriculture by the plains tribes after 1750).

166. *See id.* at 132.

> "[T]he English [colonists in Virginia] made violent and terrifying examples of resisting Indians. In August 1610, Captain George Percy surprised and attacked a Paspahegh village, killing at least sixty-five inhabitants and destroying with fire their homes and fields of growing corn. Taking prisoner the wife and children of the local chieftain, the colonists headed back to Jamestown by boat. En route, as a sport, they threw the children overboard and shot them in the water as they tried to swim for shore.

167. See *id.* at 47 for an explanation of how the colonists'

> pigs and cattle . . . invaded native crop fields to consume precious maize, beans, and squash. When Indians killed and ate trespassing livestock, the colonists howled in protest and demanded compensation for their lost property. When denied, angry colonists sought a disproportionate revenge by raiding and burning Indian villages.

crops that were actually growing in Indian Country.[168]

The purpose of this slight digression into Native American agriculture is to show that the factual and historical premises underlying the theoretical justification for allotment were incorrect. Because these assumptions were incorrect and because allotment was a flawed and failed policy, the current United States should give little or no deference to allotment-era statutes, policies, and assumptions. In the twenty-first century, virtually no one asserts that inhabitants of land who have rights of prior possession can be dispossessed of their land because another group has a system or technology for exploiting the land that would support a larger population.

It is important to place this shift into historical perspective. Through the colonial, early federal, and nineteenth century periods, no individual Indian who might have property rights under the law of the Native American government could transfer those rights to an individual Englishman or American.[169] Title could flow only from a tribe to the United States, and then to an individual. This is reflected in the case of *Johnson v. M'Intosh*.[170] If tribes, or individuals within tribes, could transfer their interests only to the United States, then the value of their lands was impaired. In other words, if the United States was the only permissible buyer of Indian property in the United States, values would decline for lack of a market, thus ensuring a low price. Usually, the price was one or two cents an acre.[171] The United States frequently sold these lands for one dollar per acre or more to land developers and land

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168. *See, e.g.*, ELBERT HERRING, ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1832), *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY 62, 63 (Francis Paul Prucha ed., 3d ed. 2000).

> On the whole, it may be matter of serious doubt whether, even with the fostering care and assured protection of the United States, the preservation and perpetuity of the Indian race are at all attainable, under the form of government and rude civil regulations subsisting among them. These were perhaps well enough suited to their condition, when hunting was their only employment, and war gave birth to their strongest excitements.

Id.

169. *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (holding that a transfer from a tribe to private individuals was ineffective and that a subsequent transfer to the United States was the only effective way to extinguish Indian title); Proclamation of 1763, *reprinted in* 9 ENGLISH HISTORICAL DOCUMENTS, *supra* note 40, at 642.

170. 21 U.S. (8 Wheat.) 543.

171. *See, e.g.*, Robert M. Owens, *Jeffersonian Benevolence on the Ground: The Indian Land Cession Treaties of William Henry Harrison*, 22 J. EARLY REPUBLIC 405 *passim* (2002).

companies. They, in turn, sold these lands for $10 to $50 an acre.[172] The profits available to the United States were substantial.[173] And the profits for land developers were also large.[174]

By the 1880s, virtually all Native Americans were confined to reservations.[175] In 1887, the year that Congress adopted the General Allotment Act, there were about 138 million acres held by tribes as reservation lands.[176] Most of the prime agricultural lands were long since lost through treaty cessions by tribes. Nonetheless, the 138 million remaining acres had substantial value and were a significant force behind the passage of the 1887 legislation.[177]

Under the General Allotment Act, each head of an Indian family on a reservation subject to allotment was given a fixed amount of land, usually 80 to 120 acres.[178] Lands not allotted to individual heads of families were declared surplus lands and were sold to the public.[179] The proceeds from these sales were placed in trust for the benefit of the tribe and its members.[180] Not surprisingly, the prices paid for these surplus lands were usually well below market prices.[181] As a result, tribes and their members lost the right to use these lands and did not receive a fair value for them.

The stated purpose of allotment was to bring private property to Native Americans so that they could enjoy the fruits of civilization.[182]

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172. *See id.*

173. *See* WILLIAMS ET AL., *supra* note 50, at 385–86 (describing $24 million in proceeds from sales of federal lands as the single largest source of federal revenue in 1836).

174. *See id.* at 385 (explaining that land speculators purchased seventy-five percent of public lands sold between 1835 and 1837).

175. DEBO, *supra* note 77, at 236–50.

176. *See id.* at 283.

177. *See id.* at 268–83.

178. *See* General Allotment Act of Feb. 8, 1887, ch. 119, § 1, 24 Stat. 388, 388.

179. *See id.* § 5, 24 Stat. at 389.

180. *See id.* § 5, 24 Stat. at 390.

181. *See* DEBO, *supra* note 77, at 269 (describing sale of "surplus" Kickapoo lands at thirty cents an acre under fraudulent circumstances).

182. U.S. DEP'T OF THE INTERIOR, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 3 (1889) [hereinafter COMMISSIONER'S REPORT OF 1889].

> The Indians must conform to "the white man's ways," peaceably if they will, forcibly if they must. They must adjust themselves to their environment, and conform their mode of living substantially to our civilization. This civilization may not be the best possible, but it is the best the Indians can get.

The perceived evil was tribal ownership of lands.[183] Tribal ownership of lands was viewed as a distinct evil—the primary force causing poverty and deprivation among Native Americans. Federal officials were not eager to admit the truth: poverty and deprivation will be the plight of almost any group of people dispossessed of their lands and isolated on small parcels of marginal lands.[184] Such was the case for most Native Americans. It is fair to say that most European settlers would not have fared very well under similar circumstances. In fact, the historical record establishes that white homesteaders did not do especially well on these submarginal lands.[185]

The allotment process sought to destroy Native American governments by destroying their authority over tribal lands.[186] If individual Indians owned the lands, and if state or federal law governed use and transfer, then tribal authority would vanish.[187] This was the theory. So, in substance, the General Allotment Act had the avowed purpose of destroying Native American governments, providing private land ownership for individual Native Americans, and finally, subjecting these lands to the jurisdiction of the state. And, not surprisingly, taxation was one of the state powers that individual states were most eager to exercise.[188]

To the credit of the federal officials who devised this plan, unrestricted ownership was not to occur immediately on these allotted lands[189] because federal officials knew quite well that many nefarious individuals were ready, willing, and able to cheat individual Native Americans out of their lands. To offer some protection, the statute restricted the sale of these lands for twenty-five years unless the federal government approved the sale.[190] In addition, these lands were exempt

183. *See id.* at 4 ("The tribal relations should be broken up, socialism destroyed, and the family and the autonomy of the individual substituted.").

184. *See* DEBO, *supra* note 77, at 283.

185. *See* Charles M. Davis, *Changes in Land Utilization on the Plateau of Northwestern Colorado*, 18 ECON. GEOGRAPHY 379 (1942) (describing unsustainable agricultural uses of these semi-arid lands).

186. *See* COMMISSIONER'S REPORT OF 1889, *supra* note 182, at 4.

187. *See id.*

188. *See* General Allotment Act of Feb. 8, 1887, ch. 119, § 6, 24 Stat. 388, 390 (subjecting lands to state jurisdiction when they became unrestricted). Congress passed the Burke Act in 1906 to clarify the time at which state taxation could commence. *See* Act of May 8, 1906, ch. 2348, § 6, 34 Stat. 182, 182–83 (stating that restrictions on taxation would be removed when the trust period ended and the individual Indian was issued a "patent in fee").

189. *See* General Allotment Act of Feb. 8, 1887, ch. 119, § 5, 24 Stat. at 389 (imposing a twenty-five year trust period before an allottee would receive unrestricted ownership).

190. *See id.*

from state taxation until the restrictions on sale were lifted. Notwithstanding these restrictions, massive and unjust dispossessions occurred.[191]

Until 1934, when Congress passed the Indian Reorganization Act (IRA), allotment occurred, surplus lands were sold, and allotted lands—after restrictions were lifted—were sold. Not all reservations were subject to allotment.[192] But those that were saw many tracts of land within the reservation boundaries quickly pass into private ownership. From 1887 to 1934, tribes lost two-thirds of their lands to the allotment process (from 138 million acres to 47 million acres).[193] In 1934 Congress froze the allotment process because it concluded that it was an abysmal failure in federal policy.[194] With passage of the IRA, Congress reaffirmed the political status of tribal governments and attempted to promote self-government.[195] Unfortunately, the allotment process left many tribes substantially destroyed because tribal lands within reservations were now in the hands of non-Indians.[196] These non-Indians expected that any tribal government would have no authority over them. Under allotment, this was the plan. But under the IRA, tribal authority was supposed to be reconstituted.[197]

The legacy of allotment, then, is a set of circumstances in which two inconsistent federal policies, one contained in the General Allotment Act and the other in the IRA, have left many tribes in a state of half destruction and half reconstruction. And as we consider the power of states over tribes and within Indian Country, we note that the purpose of the General Allotment Act was to eliminate tribes as political entities and subject Native Americans and their lands to state authority (and taxation) once assimilation (the "final solution" to the "Indian problem") was complete.

State taxation was an explicit concern of the allotment legislation. In passing this legislation, Congress realized that state taxation of lands owned by Native Americans would likely be used to extinguish title through tax sales. The loss of these lands would frustrate the federal

191. *See* DEBO, *supra* note 77, at 268–83.

192. *See id.* at 283, 290–91.

193. *See id.* at 283.

194. *See id.* at 290.

195. *See* WASHBURN, *supra* note 74, at 254.

196. *See* DEBO, *supra* note 77, at 282.

197. *See* DEP'T OF THE INTERIOR, ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 78–79 (1934) (The Indian Reorganization Act was intended to repair the "incalculable damage done by the allotment policy.").

policy of turning Native Americans into productive, responsible, and God-fearing farmers. Accordingly, Congress preserved tax immunity[198] of Native Americans and their lands during the transitional period that would some day lead to total assimilation. These tax immunity rules were merely an extension of the age-old practice of viewing Native Americans who retained a politically separate relationship as beyond the taxing authority of state governments. During this period of transition, when Native Americans were not yet full-fledged members of American society, it made sense not to subject their lands to state taxation and to continue with the tradition of treating tribes and lands within reservations as beyond the power of state taxation.

The whole point of the preceding discussion about the allotment laws is to show that Congress, even as it attempted to destroy tribes once and for all, still adhered to the principle that the political separation of tribes and Native Americans placed them beyond the reach of state taxation until the allotment and assimilation process was complete. This is all the more clear when one considers the enabling legislation for many of the western states.[199] Congress passed these enabling statutes before, during, and after the allotment legislation.[200] The enabling legislation provided immunity from taxation but also acknowledged that Congress might some day remove such immunity.[201] In any case, the allotment legislation and the enabling legislation reaffirmed the tax immunity principle.

Left undecided by the allotment legislation was the state power to tax non-Indians engaged in economic activities within a reservation. Four cases from the late nineteenth century involved the power of a territory to impose property taxes on railroads and cattle owners.[202] The United States Supreme Court decided these cases during the time that federal policy strongly favored allotment and assimilation. In this context, the Court paid little attention to the negative effects that these decisions might have had on the tribes. For example, in *Thomas v. Gay*, the most egregious case, the territorial taxation of non-Indian cattle owners who had grazing leases with the tribe directly impaired the

198. *See* Act of May 8, 1906, ch. 2348, § 6, 34 Stat. 182, 182–83.

199. *See* COHEN, *supra* note 138, at 255–56.

200. *See id.* at 256 n.19 (giving examples of territory acts and state enabling legislation imposing restrictions starting in 1861 and lasting until 1910).

201. *See id.* at 256.

202. *See* Wagoner v. Evans, 170 U.S. 588 (1898); Thomas v. Gay, 169 U.S. 264 (1898); Maricopa & Phoenix R.R. Co. v. Ariz. Territory, 156 U.S. 347 (1895); Utah & N. Ry. v. Fisher, 116 U.S. 28 (1885).

leases because the costs of doing business for the cattle owners went up and reduced their ability to make lease payments.[203]. For our purposes, the cases are distinguishable because all the taxpayers were non-Indians. States, however, disagree with this conclusion in the context of state income taxation of non-member Indians living and working on another tribe's reservation.[204] Some states contend that all non-members of a tribe, whether or not they are Native Americans, are subject to state income taxation.[205] As a result, states are likely to rely on *Thomas v. Gay* as authority that they can tax non-member Indians who live and work on another tribe's reservation.

J. The Indian Citizenship Statutes

The Fourteenth Amendment did not extend citizenship to Native Americans born in the United States if they retained their political separation. The drafters of the Fourteenth Amendment used the phrase "Indians not taxed" to describe Native Americans who remained politically separate.[206] The allotment process was intended to destroy tribes as governments, eliminate political separation, and extend citizenship to Native Americans who had gone through the allotment process and who had become assimilated.[207] As part of this assimilation process,[208] Congress passed citizenship provisions.[209] Clearly, the federal

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203. *See* Scott A. Taylor, *A Judicial Framework for Applying Supreme Court Jurisprudence to the State Income Taxation of Indian Traders*, 2007 MICH. ST. L. REV. 841, 857–58.

204. *See, e.g.*, LaRock v. Wis. Dep't of Revenue, 621 N.W.2d 907, 908–09 (Wis. 2001) (not relying on these cases, but concluding that any non-member, whether or not an Indian, is subject to state income taxation even if she was formerly married to a member, is a member of another tribe within the state, lives on the reservation, works for the tribe, and has children who are members).

205. *See id.*

206. *See* Elk v. Wilkins, 112 U.S. 94, 99 (1884).

207. *See* General Allotment Act of Feb. 8, 1887, ch. 119, § 6, 24 Stat. 388, 390.

208. *See id.* The text of the provision discloses the underlying assimilationist goals of the General Allotment Act:

> And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act [General Allotment Act], or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the

policy of allotment viewed citizenship as an important end point in the assimilation process. As a practical matter, if all members of a tribe proceeded through the allotment process and received citizenship, then the tribe would have ceased to exist for lack of membership. Elimination of the tribe, therefore, would have effectively eliminated the political separation.[210] Federal law explicitly removed limitations on state taxation of Indians' lands that had gone through the end point of the allotment process.[211] Allotment in practice, however, did not have the intended effect of eliminating tribes,[212] and allottees who had received an unrestricted ownership and a certificate of competency often retained tribal membership, which, in turn, led to judicial confusion.[213]

> United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

Id.

209. *See* Act of March 3, 1901, ch. 868, 31 Stat. 1447 (amending section 6 of the General Allotment Act of 1887 so that the allotment related citizenship rules applied to tribes located within the Indian Territory, which later became encompassed with the admission of Oklahoma in 1907); Act of May 8, 1906, ch. 2348, 34 Stat. 182, 182–83 (amending section 6 of the General Allotment Act of 1887 to clarify that citizenship would not be conferred to an allotment recipient until the Secretary of the Interior had made a determination of competency to manage his own affairs).

210. The Supreme Court's decision in *Elk v. Wilkins*, 112 U.S. 94 (1884), reflects the pre-allotment paradigm. John Elk was a Native American who had voluntarily severed his ties to his tribe and was effectively assimilated into white society. *Id.* at 95. No doubt out of racial animus, an election official in Omaha, Nebraska, denied Mr. Elk the right to register to vote because he was an Indian. *See id.* The United States Supreme Court upheld the state action because Mr. Elk, who was a non-citizen by operation of the Fourteenth Amendment, had not gone through the process of becoming naturalized. *Id.* at 102, 109. *Elk v. Wilkins* is especially important for our purposes because it emphasizes the legal effects of political separation.

211. *See* Act of May 8, 1906, ch. 2348, 34 Stat. 182, 183 (Burke Act). Before Congress passed the Burke Act in 1906, the tax collectors in Roberts County, South Dakota attempted to impose property taxes on improvements located on a restricted allotment under the theory that the General Allotment Act of 1887 immediately eliminated the separate political existence of the tribe and exposed the land to the state's power to tax. The trial court placed emphasis on the citizenship of the Indians. *See* United States v. Rickert, 106 F. 1, 6 (N.D.S.D. 1901). The United States Supreme Court, however, concluded that state taxation, if allowed before the allotment process was concluded, would frustrate the federal policy of protecting allottees from dispossession caused by state taxation. *See* United States v. Rickert, 188 U.S. 432, 438 (1903) ("To say that these lands may be assessed and taxed by the county of Roberts under the authority of the State, is to say they may be sold for the taxes, and thus become so burdened that the United States could not discharge its obligations to the Indians without itself paying the taxes imposed from year to year, and thereby keeping the lands free from incumbrances.").

212. *See* DEBO, *supra* note 77, at 283 (observing that "the Indian spirit is strong").

213. *Compare In re* Heff, 197 U.S. 488, 509 (1905) (finding that allotment, followed by transfer of unrestricted title, and granting of citizenship terminated the status of a person as

In 1919 and in 1924, Congress passed two Indian citizenship statutes that were outside of the allotment process paradigm. The 1919 statute granted citizenship to Native Americans who served in the military during World War I.[214] And the 1924 statute granted citizenship to all Native Americans born in the United States.[215] After 1924, the question then became whether citizenship for all Native Americans extinguished political separation and, therefore, permitted state taxation.

In 1943, without answering this question directly, the United States Supreme Court placed significant, but not dispositive, weight on the U.S. citizenship of three deceased Native Americans whose estates Oklahoma had attempted to tax. In an opinion authored by Justice Black in the case of *Oklahoma Tax Commission v. United States*, the Court noted:

> Congress has passed laws under which Indians have become full-fledged citizens of the State of Oklahoma. Oklahoma supplies for them and their children schools, roads, courts, police protection and all the other benefits of an ordered society. Citizens of Oklahoma must pay for these benefits. If some pay less, others must pay more.[216]

In the opinion, Justice Black attempted to compare this case with the clear political separation case of *Worcester v. Georgia*:

> Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy as in *Worcester v. Georgia* . . . ; and, unlike the Indians involved in *The Kansas Indians* case, . . . they are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions. Their lands are held in fee, not in trust, as in the *Rickert* case, and the doctrine of constitutional immunity from

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an Indian), *with* United States v. Nice, 241 U.S. 591, 599 (1916) (reading section 6 of the General Allotment Act of 1887 and its granting of citizenship as not extinguishing the existence of the tribe and noting that citizenship does not remove federal power over tribes or their members).

214. *See* Act of Nov. 6, 1919, ch. 95, 41 Stat. 350.

215. *See* Act of June 2, 1924, ch. 233, 43 Stat. 253.

216. Okla. Tax Comm'n v. United States, 319 U.S. 598, 608–09 (1943) (citations omitted).

> taxation for the income of their holdings on the federal instrumentality theory has been renounced . . . .[217]

States could argue that the granting of citizenship to all Native Americans in 1924 eliminated political separation and subjected Native Americans to state income taxation even when they live and work within the territorial boundaries of their tribe. A more reasonable reading of the case, however, is that state taxation is appropriate when no federal law preempts taxation for activity not connected with a tribe or its reservation. The *Oklahoma Tax Commission* case involved an Oklahoma estate tax on the estates of deceased Native Americans whose wealth was held in trust by the United States.[218] The assets included funds and allotted lands that were still subject to restrictions.[219] The Court acknowledged that the restricted lands were exempt from taxation by federal statute but that the funds and other personal property, no longer having a direct connection with the allotted lands, were not.[220]

Before the beginning of allotment, the universally accepted paradigm was that Native Americans living in Indian Country were exempt from state and federal taxation.[221] The federal policy of allotment and assimilation envisioned the end of tribes and the beginning of state taxation of Native Americans and their lands.[222] Initially, the allotment policy would include a period of transition that would take twenty-five years.[223] During this transition period, tribes would continue to exist and allotted lands would be exempt from taxation.[224] The twenty-five year period was extended[225] and then abandoned altogether in 1934 with the enactment of the Indian

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217. *Id.* at 603 (citations omitted).

218. *Id.* at 599.

219. *Id.* at 600 n.1.

220. *Id.* at 611–12.

221. *See* Method of Determining "Indians Not Taxed," *supra* note 129, at 992, 994.

222. *See* Act of May 8, 1906, ch. 2348, 34 Stat. 182, 182–83 (amending the General Allotment Act to clarify that states could not tax allotments until the restrictions were lifted, which, by implication, meant that states could tax these lands after the lifting of these restrictions); Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998) (allowing the imposition of county property tax on land owned by the Tribe within its own reservation because the land had originally been allotted and had the restrictions removed).

223. *See* General Allotment Act of Feb. 8, 1887, ch. 119, § 5, 24 Stat. 388, 389–90.

224. *See* Taylor, *supra* note 123, at 65–70.

225. *See id.* at 66–67.

Reorganization Act.[226] In the *Oklahoma Tax Commission* case, the Court had to address the details of state taxation during the interim period. Justice Black reasoned that once the political identity of the tribe was gone, or nearly gone, state taxation involving off-reservation assets should have been permissible in the absence of an explicit federal prohibition.[227]

Justice Murphy's dissent, however, showed a willingness to imply a tax exemption from the nature of the federal relationship with the specific Native Americans.[228] Justice Murphy viewed the federal holding of the assets as evidence of a federal guardian/ward relationship that state taxation would impair or frustrate.[229] He saw this as preempting the state's power to tax.[230] Ironically, Justice Murphy's logic of an implied federal preemption of the state power to tax would be used by Justice Black to invalidate Arizona's attempt to impose a state sales tax on a licensed Indian trader.[231]

Taken together, the citizenship statutes and the decision in *Oklahoma Tax Commission v. United States* do not provide states with a legal basis for taxing activity within Indian Country. In connection with our issue of state income taxation of non-member Indians, we will see that states do not rely on United States citizenship. Instead, they point to the lack of membership in the tribe on whose reservation the non-member Indian lives and works.

III. THE MODERN CASES

A. The United States Supreme Court Cases

Based on the extensive legal history of Native Americans, which dates from colonial times, it would seem axiomatic that Native Americans within reservations are beyond the power of state taxation.

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226. *See id.* at 68–69.

227. *See* Okla. Tax Comm'n v. United States, 319 U.S. 598, 603 (1943).

228. *See id.* at 612–13 (Murphy, J., dissenting).

229. *See id.* at 619.

230. See *id.* at 619–20, where Justice Murphy stated that "when Congress imposed restrictions upon Indian property, it meant, and was saying in effect, that the property was exempt from state taxation while the restrictions continue or until Congress waives the immunity."

231. *See* Warren Trading Post Co. v. Ariz. State Tax Comm'n, 380 U.S. 685, 686 (1965) (Federal regulation of the Indian traders was sufficient to preempt state taxation even though the relevant federal statutes provided no explicit exemption.). Justice Black did not cite *Oklahoma Tax Commission v. United States*, presumably because of the inconsistency in logic.

Nonetheless, states have remained ever-optimistic that the passage of time, and time alone, can change the law.[232] For example, Arizona and its taxing authority believed that Rosalind McClanahan, a member, resident, and employee of the Navajo Nation, should pay the Arizona income tax on her wages paid by the tribe.[233] The logic of the state was simple: she lived within Arizona and had income;[234] therefore, she owed Arizona income tax. The state tax authority argued, and the Arizona Court of Appeals held, that Ms. McClanahan could escape the Arizona income tax only if she could point to an exemption in the state tax statute or in a federal law specifically preempting the state's power to impose an income tax.[235] The Arizona court acknowledged that a state tax that infringed the sovereignty of the Navajo Nation could be invalid.[236] The court, however, found that state income tax did not fall on the Navajo Nation and, therefore, had no adverse impact on the tribe.[237] The court acknowledged that the state enabling statute and the state's constitution prohibited state taxation of Indian lands.[238] The court, however, concluded that this prohibition extended only to lands and not to income.[239] In this sense, the passage of time was on the state's side because no states had an income tax in 1910 when Congress passed the enabling legislation that permitted Arizona to be admitted to the Union.[240] Therefore, Congress, having in mind state efforts to tax Indian

232. *See, e.g.*, McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1973); Okla. Tax Comm'n v. United States, 319 U.S. 598 (1943); The New York Indians, 72 U.S. (5 Wall.) 761 (1866); The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866).

233. *See* McClanahan v. State Tax Comm'n of Ariz., 484 P.2d 221, 222–23 (Ariz. Ct. App. 1971) ("[T]he relationship of the Indian, be he reservation oriented or otherwise, to the rest of the citizens of the United States and to the states themselves, has drastically changed in the approximate 140 years since *Worcester v. Georgia*.").

234. *See id.* at 222 (noting that the taxpayer, a member and resident of the Navajo Nation, was also a resident of Arizona).

235. *See id.* at 225 (considering the federal enabling legislation that prohibits state property taxation and reasoning that the federal prohibition did apply to Arizona's income tax).

236. *See id.* at 223.

237. *See id.* at 224 (focusing on the imposition of the income tax on Ms. McClanahan instead of the exercise of state power and its negative effect on the Navajo Nation's right of self-government).

238. *See id.* at 225.

239. *See id.*

240. The Arizona state enabling legislation was enacted in 1910. *See* Act of June 20, 1910, ch. 310, § 20, 36 Stat. 557, 569–70 (prohibiting state jurisdiction and state taxation of Indian reservation lands unless authorized by Congress). Wisconsin was the first state to impose an income tax in 1911. *See* W. ELLIOT BROWNLEE, JR., PROGRESSIVISM AND ECONOMIC GROWTH: THE WISCONSIN INCOME TAX 1911–1929, at 42 (1974).

lands, obviously did not think about extending the immunity to state income taxes.

Arizona's argument was one that states usually make when asserting authority over Indian Country. States assert that they have general legislative authority within their political boundaries and that any tribes are subject to such authority unless Congress otherwise prohibits its exercise. Georgia adopted the same rationale 140 years earlier when it attempted to legislate the Cherokee Nation out of existence.[241] But in *Worcester v. Georgia*, the United States Supreme Court held that the legislative power of Georgia, even when it involved a non-Indian, did not extend into Indian Country.[242]

Justice Thurgood Marshall wrote the Supreme Court's opinion in *McClanahan* and used a rationale very similar to the one used by Justice John Marshall in *Worcester*. In *Worcester*, Georgia's legislative power stopped at the reservation boundary and could not cross it to regulate the behaviors of people within the Cherokee Nation.[243] In the *Worcester* case, the Georgia statute in question made it a crime for Samuel Worcester to enter the Cherokee Nation without a permit issued by the State of Georgia.[244] The Georgia statute was both civil and criminal in nature—similar to the current regime of all states making it mandatory for drivers of motor vehicles to obtain a driver's license or face a criminal penalty for driving without a license. The law applied principally to non-Indians and was designed to cut off trade with the Cherokee Nation.[245] Justice John Marshall's analysis was straightforward. The Cherokee Nation was a political entity existing before the arrival of Europeans. The Cherokee Nation negotiated treaties with the United States. The United States passed laws regarding relations with the Cherokee Nation and other Indian tribes. This federal regime of treaties and statutes left no room for the states to

241. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

242. *See id.*

> The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.

Id.

243. *See id.*

244. *See id.* at 539.

245. *See* DEBO, *supra* note 77, at 104–06.

exercise legislative authority.[246] Federal law recognized the sovereignty of the Cherokee Nation, and federal law, under the Federal Constitution, preempted the Georgia legislation.[247]

Justice Thurgood Marshall, in *McClanahan*, reiterated the importance of federal preemption.[248] He looked at the treaties and relevant federal legislation.[249] He also recognized the importance of the Navajo Nation's sovereignty and included this as an important consideration, primarily because the Navajo Nation, like the Cherokee Nation, had a political identity that existed before the arrival of the Europeans and also had entered into treaties with the United States.[250] He noted, however, that twentieth century Supreme Court cases had given states latitude over non-Indians within Indian Country.[251]

A careful reading of his opinion shows that Justice Thurgood Marshall's use of the phrase "reservation Indians" refers to Indians who were within Indian Country whether or not they were members of a particular tribe. This is demonstrated by his reference to federal criminal jurisdiction in which the federal government, and not the state government, asserts criminal jurisdiction over crimes committed within Indian Country (1) by one Indian against another Indian or (2) by or against an Indian and involving a non-Indian. In these cases, the federal criminal jurisdiction arose so long as the person was an Indian. The specific tribal membership of the Indian was unimportant.[252] Under the

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246. *See Worcester*, 31 U.S. (6 Pet.) at 561–63.

247. *See id.*

248. *See* McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 165 (1973).

> We hold that by imposing the tax in question on this appellant, the State has interfered with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves. The tax is therefore unlawful as applied to reservation Indians with income derived wholly from reservation sources.

Id.

249. *See id.* at 173–74.

250. *See id.* at 168.

251. *See id.* at 172.

252. *See id.* at 171. Justice Marshall relied on *Williams v. Lee*, 358 U.S. 217, 220 (1959), which emphasized that "if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive." The Court in *Williams v. Lee* relied on the decision of *Donnelly v. United States*, 228 U.S. 243, 252 (1913), which involved federal jurisdiction over a murder on the Hoopa Valley Reservation of a man who was a member of the Klamath Tribe. The federal statute in question merely referred to the murder of an Indian within Indian Country and not to his membership in the specific tribe. *Donnelly*, 228 U.S. at 254. The facts in the *Donnelly* case indicate that the phrase "reservation Indian" means an Indian who is on a reservation whether or not he is a member.

relevant statutes, the federal policy of excluding state authority over Indians within Indian Country, irrespective of tribal membership, was quite clear.[253]

So, when Justice Thurgood Marshall concluded that the state power to tax did not extend to on-reservation activities of "reservation Indians," he clearly meant Indians who were members of the tribe and also those Indians who were members of other tribes. Federal law[254] and tribal law[255] often draw legitimate distinctions between Indians and non-Indians, especially in the hiring of employees. Most tribes find within their boundaries Indians who are members of other tribes. The historical record shows that intermarriage, trade, removal, the reservation system, and wars frequently caused the intermingling of Indians from different tribes.[256] In more recent times, intermingling comes about because tribes and the federal government hire professionals who are Native Americans from other tribes.[257] In addition, intermarriage among Native Americans continues to contribute to intermingling.[258]

This distinction becomes important when we consider the effect of *Duro v. Reina*, 495 U.S. 676 (1990), and the federal legislation that superseded the holding in *Duro*. *See* discussion *infra* notes 310–44.

253. *See, e.g.*, *Donnelly*, 228 U.S. at 252 (The term "Indian" in the Major Crimes Act included an Indian who was on the Hoopa Valley Reservation but was a member of the Klamath Tribe.).

254. *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 554–55 (1974) (upholding the validity of the Indian preference in hiring by the Bureau of Indian Affairs).

255. *See* Brendan O'Dell, Comment, *Judicial Rewriting of Indian Employment Preferences—A Case Comment:* E.E.O.C. v. Peabody Western Coal Company, *400 F.3d 774 (9th Cir. 2005)*, 31 AM. INDIAN L. REV. 187, 197–98 (2006) (discussing Navajo law that required certain employers to follow a Navajo preference in hiring employees).

256. *See, e.g.*, United States v. Rogers, 45 U.S. (4 How.) 567, 567–58 (1846) (involving a white man who married a Cherokee woman and whom the Cherokee Nation adopted into the tribe); ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 136–37 (5th ed. 2007) (describing some examples of tribal separations, amalgamations, and consolidations); RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT 49–51 (2d prtg. 1982) (describing the effect of intermarriage and the role Cherokee members played in leadership roles of the Tribe); Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 LAW & SOC'Y REV. 1123, 1140 (1994) (describing the practice of some tribes taking prisoners of war from other tribes and then integrating them into their own communities).

257. *See, e.g.*, N.M. Taxation & Revenue Dep't v. Greaves, 864 P.2d 324, 325 (N.M. Ct. App. 1993) (describing a taxpayer who was a member of the Rosebud Sioux Tribe in South Dakota but lived and worked, as a tribal judge, on the reservation of the Jicarilla Apache Tribe in New Mexico).

258. *See, e.g.*, LaRock v. Wis. Dep't of Revenue, 621 N.W.2d 907, 908–09 (Wis. 2001) (describing a taxpayer who was a member of the Menominee Tribe who married a member of

Justice Marshall indicated that state authority should not infringe tribal sovereignty.[259] But he did not indicate that such infringement was a categorical bar.[260] Instead, he stated that it should be the backdrop in which federal preemption is implied.[261] In looking at infringement, he emphasized that the right of native peoples to govern themselves was important.[262] Many non-member Indians play pivotal governmental roles on reservations where they live and work. Although the facts in *McClanahan* involved a person who was a member of the Navajo tribe, it is clear that Justice Marshall was speaking broadly in a context in which the term "reservation Indian" included Indians who were members of other tribes.

Following the Supreme Court's decision in *McClanahan*, appellate courts in Minnesota,[263] Montana,[264] New Mexico,[265] and North Dakota[266] all considered whether the holding in *McClanahan* extended to Indians who lived and worked on the reservations of other tribes. The appellate courts of all four states, after a careful reading of *McClanahan*, concluded the obvious: "reservation Indian" meant an Indian living and

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the Oneida Tribe, where she lived and worked).

259. See McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172–73 (1973).

260. *See id.* at 172.

261. *See id.* ("The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read.").

262. *See id.* ("It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government.").

263. *See* Topash v. Comm'r of Revenue, 291 N.W.2d 679, 680, 683 (Minn. 1980) (finding that a member of the Tulalip Tribe in Washington who lived and worked for the Bureau of Indian Affairs on the reservation of the Red Lake Band of the Chippewa Indians in Minnesota was not subject to the Minnesota income tax because the term "reservation Indian" as used in *McClanahan* included Indians who were members of other tribes).

264. *See* LaRoque v. State, 583 P.2d 1059, 1060, 1064–65 (Mont. 1978) (One of the taxpayers in this consolidated case was a member of the Turtle Mountain Chippewa Tribe in North Dakota married to a member of the Assiniboine-Sioux Tribes of the Fort Peck Reservation in Montana where he lived and worked; the court held that the holding in *McClanahan* extended to him.).

265. *See* Fox v. Bureau of Revenue, 531 P.2d 1234, 1234–36 (N.M. Ct. App. 1975) (finding that a member of the Comanche Tribe in Oklahoma was exempt from the New Mexico income tax when she lived and worked on the New Mexico portion of the Navajo Nation).

266. *See* White Eagle v. Dorgan, 209 N.W.2d 621, 622–24 (N.D. 1973) (One of the taxpayers in this consolidated case was a member of the Cheyenne River Sioux Tribe but lived and worked in the Standing Rock Tribe; the court applied the holding of *McClanahan* to him.).

working on a reservation. Two other states, Oregon[267] and Idaho,[268] enacted statutory exemptions that extended the holding of *McClanahan* to non-member Indians who live and work on another tribe's reservation. California issued a ruling extending *McClanahan*'s holding to non-member Indians.[269] Following these four state court decisions, the two state statutory provisions, and the California ruling, the question seemed well-settled until the Supreme Court decided *Washington v. Confederated Tribes of the Colville Indian Reservation.*[270]

Seven years after its *McClanahan* decision, the Supreme Court, in *Colville*, took up a complicated case involving state taxation of cigarette sales on three Indian reservations within the State of Washington.[271] Most of the issues in the case have little relevance to the question of state income taxation of non-member Indians. One issue in the case, however, seems to address the question quite directly. Washington asserted that its cigarette tax, which applied to the buyer of the cigarettes, applied to Indian purchasers who resided on the reservation where the cigarettes were sold but who were not enrolled members of that tribe.[272] Justice White, the author of the Court's opinion, saw no federal statute that preempted such taxation, nor did he see any way in which the tax infringed the particular tribe's sovereignty.[273] He saw the non-member Indians as occupying the same position as non-Indians.[274]

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267. *See* OR. REV. STAT. § 316.777 (2007); Or. Dep't of Revenue, Exempt Income Schedule for Enrolled Members of a Federally Recognized Indian Tribe (2006), *available at* http://www.oregon.gov/DOR/PERTAX/docs/101-687.pdf (providing income exemption that includes a non-member Indian who is a member of a federally recognized Indian tribe and also lives and works on an Indian reservation within Oregon).

268. *See* IDAHO CODE ANN. § 63-3026A(4)(b)(iv) (2007) (providing that state income tax exemption extends to a non-member Indian living and working on an Indian reservation within Idaho if he or she is a member of any federally recognized Indian tribe).

269. *See* Calif. Franchise Tax Bd., Legal Ruling No. 399 (1977) (withdrawn without explanation), *available at* http://www.ftb.ca.gov/law/rulings/Withdrawn/lr399.pdf (providing income taxation to any reservation Indian irrespective of tribal membership).

270. 447 U.S. 134 (1980).

271. *See id.* at 138.

272. *See id.* at 160.

273. *See id.*

274. *See id.* at 161.

> For most practical purposes those [non-member] 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.

An ever-present conceptual backdrop to Justice White's entire analysis was his observation that the tribes were attempting to use their special tax status to market a tax exemption.[275] He noted that the tribes imported untaxed cigarettes and then sold them at a lower price mostly to customers who did not live on the reservation.[276] He saw no significant federal policy or tribal interest in such endeavors.[277] Instead, he preferred activities on the reservation that added value or created wealth.[278] He definitively said that the taxation issue would be an entirely different kettle of fish if the tribes were engaged in an activity in which labor and capital were significantly involved in producing goods or services.[279]

To be fair to the tribes, we must concede that the practice of marketing a tax exemption outside of Indian Country is quite common whenever a political boundary creates a meaningful tax differential. If the political boundary is the United States and Canada[280] or between states,[281] then "marketing a tax exemption" is legally acceptable because the Supreme Court either has no jurisdiction or is disinterested in coming up with a legal theory to stop it. In fact, the Supreme Court, under a due process line of analysis, permits tax-free interstate catalogue, mail-order, and internet sales of goods.[282] The tax avoided in such cases is the sales tax of the buyer's state. These taxes are in the five to nine percent range and are substantial enough to have led many consumers to buy computers from Dell and clothes from L.L. Bean.

Id.

275. *See id.* at 155.

276. *See id.*

277. *See id.*

278. *See id.* at 156–57 ("While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services.").

279. *See id.*

280. *See* U.S. General Accounting Office, Statement of Robert A. Robinson, Cigarette Smuggling: Information on Interstate and U.S.-Canadian Activity 1 (1998), *available at* http://www.gao.gov/archive/1998/rc98182t.pdf (describing the smuggling that results from the lower tax on cigarettes sold in the United States).

281. *See, e.g.*, Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377 (1996) (concluding that states are largely free to market their tax exemptions because dormant commerce clause jurisprudence applies to discriminatory taxation on interstate commerce and not to the granting of exemptions, waivers, or tax holidays).

282. *See* Quill Corp. v. North Dakota, 504 U.S. 298, 301–02 (1992); Eric A. Ess, Comment, *Internet Taxation Without Physical Representation?: States Seek Solution to Stop E-Commerce Sales Tax Shortfall*, 50 ST. LOUIS U. L.J. 893, 894–95 (2006).

Readers of this Article will note that when they buy a computer at Best Buy they very likely will have to pay a substantial sales tax. But if they buy it from Dell, except in those states where Dell has a nexus, no tax will be charged or collected. I point this out for the benefit of the reader, lest the reader conclude that the tribes in the *Colville* case were engaged in some new scheme that had never succeeded before. In any case, the marketing of a tax exemption was a key point in Justice White's analysis.

In addition, Justice White considered whether any specific federal statutes preempted state taxation of tribal cigarette sales to non-member Indians living on the tribe's reservation.[283] His mistake here is quite obvious. He was looking for a statute that said: "States, you can't tax non-member Indians." Unfortunately, he forgot that Congress does not work that way. Treaties rarely mentioned tax matters because everyone knew that state taxes did not apply within Indian Country.[284] Some federal legislation mentioned tax matters involving Indians when a particular problem arose. So, for example, the enabling statute of Washington contains a prohibition against state taxation of Indian lands.[285] This provision arose because Kansas and New York had tried illegally to tax Indian lands in the 1860s,[286] and new states needed a reminder that they could not do that. There are some other instances of federal legislation, but cumulatively they do not provide a specific exemption for every state tax.

The *McClanahan* case is a good example of how the federal preemption law works. No specific treaty or law said that Arizona (or states generally) could impose their income taxes on reservation Indians.[287] Nonetheless, Justice Marshall read the totality of the treaties and federal legislation as having a general preemptive effect.[288] Given this approach, Arizona had to point to a specific piece of federal legislation authorizing its income taxation of reservation Indians.[289] It could point to no such statute, and, accordingly, it lost its case in the Supreme Court. In *Colville*, Washington should have been required to

283. *See Colville*, 447 U.S. at 155.

284. See Taylor, *supra* note 123, 59–64.

285. *See Colville*, 447 U.S. at 156 (citing the enabling statute, Act of Feb. 22, 1889, 25 Stat. 676).

286. *See* The New York Indians, 72 U.S. (5 Wall.) 761 (1866); The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866).

287. *See* McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 167–71 (1973).

288. *See id.* at 173.

289. *See id.* at 178–79.

do the same—point to a federal statute authorizing state taxation of non-member Indians. Had there been such a statute, the case would not have made its way to the Supreme Court because everyone would have known that such a statute controlled the outcome. Instead, Justice White viewed the "smokeshops" as an illegitimate marketing of a tax exemption[290] and, therefore, could not see any tribal interest being served by allowing such an exemption.[291]

Justice White was also mistaken in treating non-member Indians the same as non-Indians. It is very significant that the Colville Reservation itself is an amalgamation of more than one tribe brought together by the process of federal dispossession of their lands.[292] This intermingling reflects general historical forces that caused many members of different tribes to find themselves together on a single reservation. The process of sorting out these intermixings is an essential attribute of tribal sovereignty. Justice White ignored these historical facts generally and specifically. He saw non-member Indians as having no role in the life, culture, society, or government of the tribe. Justice White also was wrong in assuming that non-member Indians play no role in tribal affairs. The state cases decided in Minnesota,[293] Montana,[294] New Mexico,[295] and North Dakota[296] prove the opposite to be true. In each of those cases, the non-member Indians, on whom state authorities attempted to impose their income taxes, played meaningful roles in the life and affairs of each tribe.[297]

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290. *See Colville*, 447 U.S. at 155.

291. *See id.* at 156–57.

292. *See* Confederated Tribes of the Colville Reservation, This Is Our True Story: A Walk Through Time, http://www.colvilletribes.com/past.htm (last visited May 14, 2008).

293. *See* Topash v. Comm'r of Revenue, 291 N.W.2d 679, 680 (Minn. 1980) (Mr. Topash was a member of the Tulalip Tribe; he lived on the reservation of the Red Lake Band of Chippewa Indians and worked for the Bureau of Indian Affairs.).

294. *See* LaRoque v. State, 583 P.2d 1059, 1060 (Mont. 1978) (The facts are sparse but indicate that Mr. LaRoque was a member of the Turtle Mountain Tribe in North Dakota and lived with his wife, who was a member of the Assiniboine-Sioux Tribes of the Fort Peck Reservation in Montana.).

295. *See, e.g.*, N.M. Taxation & Revenue Dep't v. Greaves, 864 P.2d 324, 325 (N.M. Ct. App. 1993) (The taxpayer was a member of the Rosebud Sioux Tribe in South Dakota but lived and worked, as a tribal judge, on the reservation of the Jicarilla Apache Tribe in New Mexico.).

296. *See* White Eagle v. Dorgan, 209 N.W.2d 621, 622 (N.D. 1973). Joseph F. Condon was a member of the Cheyenne River Sioux Tribe in South Dakota and lived on the North Dakota side of the Standing Rock Reservation, where he worked for the Bureau of Indian Affairs, a fact not reflected in the case but revealed to this author from conversations with people who knew Mr. Condon before he passed away.

297. *See* LaRock v. Wis. Dep't of Revenue, 621 N.W.2d 907, 908–09 (Wis. 2001) (holding

When the Supreme Court considers this issue, it will have to decide whether the holding in *Colville* extends to the state income taxation of non-member Indians who live and work on reservations of which they are not enrolled members. Given the natural conservatism of the Court as a political institution, it is more comfortable distinguishing a case than overturning it.

The most obvious factor that distinguishes *Colville* from the state income tax cases is that the latter never have involved an instance of a tribe that is marketing a tax exemption. We do not have a situation where tribes recruit non-member Indians to live on their reservations so that they can avoid the state income tax. These cases show that the non-member Indian lives on another reservation for family and employment reasons. Often the non-member Indian is married to a member, works for the tribe, works for the Bureau of Indian Affairs, or runs a business providing goods and services. The tribal and federal interests are critical to the tribe, its population, its culture, and its governance.

This is not a case of non-member Indians sitting around, watching television, and smoking cheap tax-free cigarettes, which is probably the picture that Justice White had in his mind in *Colville*. Justice White noted that "[t]here is no evidence that nonmembers [who are Indians] have a say in tribal affairs or significantly share in tribal disbursements."[298] Justice White suggested that it was a factual question. On this important question, he allowed the lack of evidence to prove the lack of a tribal interest. Justice White was deciding the question of state taxation of non-member Indians as an issue of first impression in which there was no pre-existing standard. In fact, *McClanahan* and the four state income tax cases, all of which had been decided before *Colville*, reflected an apparent consensus that states could not tax on-reservation Indians for on-reservation activity even if the Indian was a member of another tribe. Accordingly, the Court should have remanded this part of the case for further factual findings to determine the role that non-member Indians played on the various reservations. It is understandable that the tribes in the case presented no evidence at the trial level because the evidentiary requirement was unknown until Justice White created it. The Court did not remand for further factual

in favor of state income taxation of Ms. LaRock even though she lived and worked on the reservation of the Oneida Nation, worked for the tribe, had married (and later divorced) an Oneida tribal member, and had two children who were members of the Oneida Nation).

298. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 161 (1980).

findings.[299]

The reported cases on state income taxation of non-member Indians paint a totally different picture. These non-member Indians are raising families, working hard for the tribal or federal government, and providing vital goods and services. Common sense tells us that intermarriage outside of a tribe with a small membership is a genetic imperative.[300] Also, some tribes have adopted membership rules that allow membership for children of mixed marriages when one parent is a member of the tribe and the other parent is a member of another federally recognized Indian tribe.[301] No matter how we cut it, marketing a tax exemption is not part of the plot of any of these state income tax stories involving non-member Indians.

In a subsequent case involving Indian gaming, Justice White demonstrated how California's power to regulate high-stakes bingo hinged on whether the tribe was attempting to market its exemption from California's bingo regulations. The underlying facts in *California v. Cabazon Band of Mission Indians*[302] are quite simple. The tribe began conducting bingo games on the reservation under a tribal ordinance that the Bureau of Indian Affairs had approved.[303] The key to the operation's success was the size of the prizes that bingo players could win. In California, by operation of state law, a bingo prize could not exceed $250.[304] The tribe, however, offered much larger prizes, which attracted more players and, understandably, resulted in commercial success. California, asserting power to regulate the tribe's bingo operations, claimed that the tribe was marketing its exemption just as the tribes had done with cigarette sales in *Colville*.[305] Justice White disagreed. He found that the bingo operation, to be successful, required substantial investments of labor and capital. Having concluded that the tribe was not marketing an exemption, Justice White held that California could not regulate the tribe's bingo operations and was without legal authority to force the tribe to limit its prizes to $250.[306]

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299. *Id.* at 164.

300. *See* Alan H. Bittles & James V. Neel, *The Costs of Human Inbreeding and Their Implications for Variations at the DNA Level*, 8 NATURE GENETICS 117 (1994).

301. *See* STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 93–94 (3d ed. 2002).

302. 480 U.S. 202 (1987).

303. *See id.* at 204–05.

304. *See id.* at 205.

305. *See id.* at 219.

306. *See id.* at 219–22.

The *Cabazon* case caused states to fear that tribes would begin or expand gaming operations. Congress responded quickly with the passage of the Indian Gaming Regulatory Act,[307] which now provides a shared role for tribes, states, and the federal government. A state has a role because the statute requires tribes and states to negotiate gaming compacts, which then serve as an intergovernmental agreement in which the state can protect its interest.[308]

If we read *Colville* and *Cabazon* together, we can conclude that the absence of a tribe marketing an exemption definitely changes the analysis. State income taxation of non-member Indians will almost never involve the marketing of a tax exemption. It is unlikely that a non-member Indian would move to a different tribe for the sole purpose of avoiding imposition of a state income tax. This would only be worthwhile for relatively high income taxpayers. Outside of Indian Country, Florida is a state that markets its exemption from state income taxation. It can offer residence to taxpayers from states with high income taxes.[309] This works very well for retirees. But it will not work for Indian Country because Florida, Texas, and Nevada have already cornered the market. Those states have legal certainty in marketing their tax exemption. Tribes, on the other hand, are much more interested in promoting a healthy environment, good education, and job opportunities for those living on their reservations. As a result, states,

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> [T]he Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians. They have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide.

Id. at 219.

307. *See* Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701–2721 (2006)).

308. 25 U.S.C. § 2710(d).

309. I was attending a cocktail reception for our law school's Board of Governors. One of the members of the Board had a complicated tax question and the dean directed him to me. The look on the dean's face suggested that I should be helpful to this Board member. The Board member and I talked, he gave me his card, and I said I would get back to him. I noticed that his card gave a Florida address for someone whose family and professional life had been spent in Minnesota. Before he left, I said, "Oh, you live in Florida. There's no income tax in Florida, unlike Minnesota, which has a high income tax." He said, "That's why I moved there." Other states with no income tax include Texas and Nevada. The first President Bush maintained his residence in Texas throughout his presidency, instead of Maine, where he actually owned a house at the time and where he probably spent more time. Texas has no income tax but Maine does. His tax returns show that he paid no income tax to Maine.

when they assert the power to tax the income of non-member Indians, should have to prove that a particular tribe is marketing a tax exemption when it permits a particular non-member Indian to reside within its reservation boundaries.

Three years after *Cabazon*, the Supreme Court decided *Duro v. Reina*.[310] *Duro* involved the question of tribal criminal jurisdiction over a non-member Indian named Albert Duro. The Court had addressed the same issue twelve years earlier when the question of tribal criminal jurisdiction involved a non-member, non-Indian.[311] In the *Duro* case, the criminal defendant was a member of the Torres-Martinez Band of Cahuilla Mission Indians of California.[312] Mr. Duro was living on the reservation of the Salt River Pima-Maricopa Indian Community of Arizona and had a job working for a company owned by the tribe.[313] While on the Salt River Reservation, he allegedly shot a fourteen-year-old boy who was a member of the Gila River Indian Tribe.[314] Under the Major Crimes Act, the United States had criminal jurisdiction over Mr. Duro.[315] He was arrested in California by federal agents, but the indictment against him was dismissed.[316] After returning to Salt River, Mr. Duro was arrested and charged with the illegal firing of a weapon on the reservation, which under federal law at the time could not carry a fine of more than $500 or imprisonment of more than six months.[317] Mr. Duro filed a writ of habeas corpus with the federal court, which granted the writ.[318] The case ultimately made its way to the United States Supreme Court. The Court held that the tribal court of the Salt River Pima-Maricopa Indian Community did not have criminal jurisdiction over Mr. Duro. In reaching this conclusion, Justice Kennedy, writing for the majority, had the occasion to consider the tax status of non-member Indians and relied on the decision in the *Colville* case.[319] He emphasized

310. 495 U.S. 676 (1990).

311. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194 (1978) (holding that the tribe did not have criminal jurisdiction over a non-Indian who committed crimes on the reservation).

312. *See Duro*, 495 U.S. at 679.

313. *See id.*

314. *See id.*

315. *See* 18 U.S.C. § 1153 (2006).

316. *See Duro*, 495 U.S. at 679–80.

317. *See id.* at 681.

318. *See id.* at 681–82.

319. *See id.* at 686–87.

> The distinction between members and nonmembers and its relation to

that in *Colville* non-member Indians had the same tax status (not exempt from state cigarette tax) as non-Indians. He was reasoning by analogy and asserting that non-member Indians should be treated the same as non-Indians.

Justice Kennedy's reliance on *Colville* is inappropriate because (1) Justice White ended up treating non-member Indians the same as non-Indians, (2) the tribe was marketing a tax exemption, and (3) there was no evidence showing the non-member Indians played an important role within the tribe.

If we evaluate *Duro*'s use of *Colville* in light of *Cabazon*, we see that Justice Kennedy's logic is faulty. In *Cabazon*, where the tribe was not marketing an exemption, the Court prohibited the application of California gaming law when most of the bingo players were non-Indian, non-residents of the Cabazon Band. The whole purpose of the gaming operation was to bring mostly non-Indians to the reservation to play bingo on Sunday afternoons. In that case, the tribal and federal interest in promoting economic development was sufficient to oust California of its regulatory power. In addition, we should look at the facts in *Duro*. We should ask whether the tribe had an interest in promoting law and order in the case of a man who was a non-member Indian who lived on the reservation and worked for one of the tribe's businesses. The answer seems so very clear that criminal jurisdiction in Mr. Duro's case was core to the tribe's ability to maintain and encourage a safe community.

Underlying Justice Kennedy's rationale is the unexpressed assumption that membership in a political entity is the justification for the exercise of criminal jurisdiction or taxing power. Many examples prove his logic false. So, for example, when Justice Kennedy travels to London to teach a summer course for an American law school, he is required to pay the British value-added tax on goods and services he

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> self-governance is recognized in other areas of Indian law. Exemption from state taxation for residents of a reservation, for example, is determined by tribal membership, not by reference to Indians as a general class. We have held that States may not impose certain taxes on transactions of tribal members on the reservation because this would interfere with internal governance and self-determination. But this rationale does not apply to taxation of nonmembers, even where they are Indians . . . .

Id. (citing Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 160–61 (1980); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973)).

purchases, which would include food and lodging. In addition, his earnings are subject to the British income tax unless exempted by statute or treaty. Likewise, his conduct is subject to British criminal jurisdiction. All the while, he is also subject to federal and state taxation because of citizenship and residence. While in Britain, he cannot vote in local, national, or European elections because he is and remains a United States citizen and not a subject of the United Kingdom. His position as a Justice of the United States Supreme Court effectively prohibits him from accepting citizenship in another country.[320]

Another rationale of Justice Kennedy's opinion is that tribes cannot exercise criminal jurisdiction because their dependent status limits their sovereignty.[321] Why this is so is unclear. A tribe, as a government, originally had the authority, like any government, to provide law and order for its members. Treaties have not diminished this power nor has Congress provided otherwise. To find a lack of tribal power, Justice Kennedy relied on the much contested "implicit divesture" doctrine, which Justice Rehnquist developed in *Oliphant*.[322] Under this doctrine, tribes, as determined by the United States Supreme Court, lose sovereign powers that are inconsistent with their political status within the American legal system. As an example, tribes allegedly cannot make treaties with foreign powers.[323]

Congress believed that the United States Supreme Court made a mistake in *Duro v. Reina*. Congress legislatively overruled the *Duro* decision with a provision contained in an appropriations statute.[324] Known as the *Duro*-fix, this legislation was tested in *United States v. Lara*.[325] Billy Jo Lara was a member of the Turtle Mountain Band of Chippewa Indians in North Dakota.[326] While on the reservation of the Spirit Lake Tribe of North Dakota, he assaulted a federal law

320. No citizen of a foreign country has ever served on the United States Supreme Court.

321. *See Duro*, 495 U.S. at 684–88.

322. *See generally* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

323. *See id.* at 208–09.

324. *See* Dep't of Defense Appropriations Act of 1991, Pub. L. No. 101-511, § 8077(b)–(d), 104 Stat. 1856, 1892–93 (codified at 25 U.S.C. § 1301(2) (2006)) (providing that "'powers of self-government' means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians").

325. *See* 541 U.S. 193, 197–98 (2004).

326. *See id.* at 196.

enforcement officer.[327] Mr. Lara pled guilty to a tribal charge of committing "violence to a policeman" and served a ninety-day sentence.[328]

After pleading guilty to the tribal charge, he was charged in the federal district court of North Dakota with the federal crime of assaulting a police officer.[329] Because of the similarity between the tribal and federal criminal offenses, Mr. Lara claimed that the federal prosecution was barred by the Double Jeopardy Clause of the U.S. Constitution.[330] The validity of his claim hinged on whether the criminal jurisdiction of the Spirit Lake Tribal court was an inherent authority belonging to the tribe or one that the tribe had acquired through a grant of power from Congress when it passed the *Duro*-fix legislation.[331] In *United States v. Wheeler*, the Supreme Court decided that the general criminal jurisdiction of a tribe derives from its inherent sovereignty and does not derive from Congress.[332] Accordingly, the Navajo Nation in the *Wheeler* case was viewed as a separate sovereign whose prior criminal prosecution did not bar Mr. Wheeler's subsequent federal prosecution by operation of the double jeopardy protection afforded him in the Fifth Amendment.[333]

The Court in the *Lara* case, in an opinion written by Justice Breyer, concluded that Congress had the power to clarify inherent tribal sovereignty[334] and that the intent of the *Duro*-fix was not to grant a power tribes did not have but to confirm powers that they always had and never lost.[335] Put another way, Congress reversed the decision and the logic of the Supreme Court's decision in *Duro*.[336]

In his concurring opinion, Justice Kennedy explained that the basis of the decision could be narrower based solely on the determination of Congress that it did not delegate power to the tribe.[337] Justice Kennedy, out of loyalty to his opinion in *Duro*, assumed that the tribe did not have

327. *See id.*

328. *See id.*

329. *See id.* at 197.

330. *See id.*

331. *See id.* at 197–98.

332. *See* 435 U.S. 313, 322–23, 328 (1978).

333. *See id.* at 328–30.

334. *See Lara*, 541 U.S. at 199–205.

335. *See id.* at 206–07.

336. Justice Breyer approached the judicial/legislative difference of opinion diplomatically by pointing out that the Court routinely looks at all sources of authority and that the *Duro*-fix legislation was not there at the time the court decided *Duro*. *See id.*

337. *See id.* at 211–12 (Kennedy, J., concurring).

criminal jurisdiction until the *Duro*-fix.[338] He conceded that Congress had the power to clarify the situation.[339] But he was not so sure that Congress had the power to place a United States citizen outside the protections of the United States Constitution.[340] Justice Kennedy is correct that Mr. Lara's rights in the tribal court are defined by tribal law and by the standards that Congress has established in the Indian Civil Rights Act.[341] The procedural rights of the United States Constitution do not apply in the tribal court proceeding.[342] The fallacy of Justice Kennedy's logic is his assumption that tribes lost (or perhaps never had) inherent sovereignty to exercise criminal jurisdiction over non-member Indians.[343] Finally, an unstated assumption of his position is that the quality of tribal justice cannot equal the quality of justice to be delivered by the federal government. However, a rereading of *Oliphant*, *Duro*, and *Lara* paints a picture of responsible tribal law enforcement. By not providing tribes with criminal jurisdiction, the Court encourages lawlessness. In *Lara*, where the tribal court exercised criminal jurisdiction, Mr. Lara did the crime and served the time. In *Oliphant* and *Duro*, the Supreme Court tied the hands of tribal law enforcement, thereby allowing Mr. Oliphant to escape the possibility of punishment for allegedly destroying property and Mr. Duro for allegedly committing murder.[344]

In any case, the question still remains. Does the dicta in *Duro* mean anything after Congress reversed the decision with the *Duro*-fix and after the Supreme Court has validated this legislative solution? I do not think so. But obviously, state courts looking for any excuse to expand state taxing power are willing to rely on dicta from a case that Congress has legislatively invalidated.

B. The State Cases and Legislative Responses

The Wisconsin Supreme Court, in deciding in favor of the imposition of the Wisconsin income tax on a non-member Indian living and working on the Oneida Reservation, relied on *Colville* and *Duro*.[345] Ms.

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338. *See id.* at 212.

339. *See id.* at 211.

340. *See id.* at 212.

341. *See* 25 U.S.C. §§ 1301–1303 (2006) (passed in 1968).

342. *See Lara*, 541 U.S. at 212 (Kennedy, J., concurring).

343. *See id.*

344. In both cases, the punishment would have taken place only if the defendants pled or were found guilty.

345. *See* LaRock v. Wis. Dep't of Revenue, 621 N.W.2d 907, 909 (Wis. 2001). For

Joan LaRock was a member of the Menominee Tribe in Wisconsin and married a member of the Oneida Tribe.[346] She and her husband lived on the Oneida reservation and had four children, all of whom were members of the Oneida Tribe.[347] She and her husband divorced, but she continued to live on the Oneida Reservation with her children.[348] Ms. LaRock worked at the tribe's casino, and these earnings were the income that Wisconsin sought to tax.[349]

The reasoning of the Wisconsin Supreme Court started with *McClanahan* and then explained how *Colville* and *Duro* confirmed that the state's power to impose its income tax extended to non-member Indians.[350] In answering Ms. LaRock's contention that *Colville* should be limited to its facts and not extended to an income tax, the court essentially reasoned that a tax was a tax.[351] And a non-member was a non-member.[352] The court ignored her connection to the Oneida Tribe through residence, marriage, children, and employment. The court claimed that *Colville* established a bright-line test of non-membership.[353] Although it quoted Justice White's language in *Colville* noting the lack of evidence showing connection, the court never discussed Ms. LaRock's many connections to the Oneida Tribe.[354] Finally, the Wisconsin Supreme Court failed to consider the absence of tribal efforts to market a tax exemption.[355]

It is especially ironic that Justice White's opinion in *Cabazon* paved the way for the Oneida casino in Wisconsin. It was the absence of marketing a tax exemption that kept California from regulating the bingo operation of the Cabazon Band.[356] The *Cabazon* decision led to the passage of the Indian Gaming Regulatory Act[357] by Congress, which in turn led to an agreement (gaming compact) between Wisconsin and

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thoughtful criticism of the LaRock case from a lawyer who worked on behalf of Ms. LaRock, see generally Jennifer Nutt Carleton, *State Income Taxation of Nonmember Indians in Indian Country*, 27 AM. INDIAN L. REV. 253 (2002).

346. *LaRock*, 621 N.W.2d at 908–09.

347. *See id.*

348. *See id.*

349. *See id.*

350. *See id.* at 911–12.

351. *See id.* at 912–13.

352. *See id.*

353. *See id.* at 913.

354. *See id.* at 912–13.

355. *See id.* at 911–12.

356. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 219–20 (1987).

357. *See* 25 U.S.C. §§ 2701–2721 (2006).

the Oneida Tribe, which allowed the operation of the casino, thereby providing Ms. LaRock with a job and the financial means to raise four children. Although Ms. LaRock may not be a member of the Oneida Tribe and she may not be able to vote in Oneida tribal elections, she is an important and vital part of the social and cultural fabric that makes up the Oneida Nation and the reservation community.

The Wisconsin Supreme Court seized on the opportunity to apply a mechanical, bright-line test that is not supported by the case law. *Colville* involved a narrow holding contingent on the absence of a factual showing and was further narrowed with the Supreme Court's decision in *Cabazon*. Likewise, the *Duro* dicta became meaningless when Congress stepped in and reaffirmed the historical reality that non-member Indians have always been an important and critical part of the cultural, social, economic, and political life of most federally recognized Indian tribes.

The New Mexico Court of Appeals, in *New Mexico Taxation and Revenue Department v. Greaves*,[358] approached the issue in basically the same way as the Wisconsin Supreme Court. The court noted its earlier opinion in which it had applied *McClanahan* to exempt on-reservation income of a non-member Indian,[359] but it ultimately read *Colville* and *Duro* as permitting state income taxation of non-member Indians, with virtually no analysis.[360] A closer reading of the cases would have shown the court the limitations of *Colville* and *Duro* as Supreme Court precedent.[361]

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358. *See* 864 P.2d 324 (N.M. Ct. App. 1993).

359. *See id.* at 325. The earlier decision is worthy of brief consideration. It was decided three years after *McClanahan* and involved a member of the Comanche Tribe who lived on and worked for the Navajo Nation. *See* Fox v. Bureau of Revenue, 531 P.2d 1234, 1234 (N.M. Ct. App. 1975), *cert. denied*, 540 P.2d 248 (N.M. 1975), *cert. denied*, 424 U.S. 933 (1976). The New Mexico court relied on *McClanahan* and decisions from three other states. *See id.* at 1234–36. The court noted that Ms. Fox was married to a non-Indian and that she conceded that his income was subject to the New Mexico income tax. *See id.* at 1234. The court made no further exploration of her ties to the Navajo Tribe or the nature of her job. Finally, lawyers for the Bureau of Revenue felt strongly enough about their case in *Fox* to go to the trouble of filing certiorari petitions to both the New Mexico and the United States Supreme Courts—part of the unending onslaught. The decisions show that Frank Katz was the lawyer for the New Mexico Department of Taxation and Revenue in *Fox* and in *Greaves*, some eighteen years later.

360. *See Greaves*, 864 P.2d at 325.

361. The weakness of the court's analysis is described in Kyle T. Nayback, Comment, *New Mexico Taxes Non-Member Indians Who Work on a Reservation:* New Mexico Taxation and Revenue Dep't v. Greaves, 25 N.M. L. REV. 129, 137–39 (1995) (criticizing the court's expansive use of *Colville* and *Duro*).

More recently, the tax commissioner of North Dakota has attempted to relitigate its earlier loss in *White Eagle v. Dorgan*.[362] The case involved Thelma Luger, a member of the Cheyenne River Tribe in South Dakota, who lived and ran a convenience store on the Standing Rock Reservation in North Dakota.[363] Ms. Luger's father was a member of the Cheyenne River Sioux Tribe and her mother was a member of the Standing Rock Tribe.[364] Following tradition, Ms. Luger, who was eligible for membership in both tribes, elected to become an enrolled member of her father's tribe.[365] Ms. Luger's extended family included relatives from both tribes.[366]

Her convenience store on the Standing Rock Reservation provided important goods and services to the reservation community.[367] The vast majority of her customers were members of the Standing Rock Tribe.[368] Her convenience store had value to the community, not because it profited from the marketing of a tax exemption, but because she was willing to set up a business in a remote area so the members of the community would not have to travel long distances to buy food and fuel.[369] Ms. Luger's case went before an administrative law judge.[370] Her lawyer fully briefed the case and explained the limitations of *Colville* and *Duro* as precedent.[371] Her lawyer also explained how the New Mexico and Wisconsin courts had erroneously applied *Colville* and *Duro* as binding precedent.[372] The administrative law judge, not surprisingly, held in favor of North Dakota's power to impose its income tax on Ms. Luger, finding her to be the equivalent of a non-Indian resident of the Standing Rock Tribe, notwithstanding her extensive family and economic ties to it.[373] Her case, at least for future years, became moot when the tribes in North Dakota succeeded in convincing the North Dakota legislature to adopt a statutory rule exempting non-

362. *See* 209 N.W.2d 621, 622 (N.D. 1973).

363. *See* Luger v. Fong, N.D. Office of Admin. Hearings, File No. 20050257 (Dec. 28, 2006) (on file with author).

364. *See id.*

365. *See id.*

366. *See id.*

367. *See id.*

368. *See id.*

369. *See id.*

370. *See id.*

371. *See* Petitioner's Brief in Luger v. Fong (on file with author).

372. *See id.*

373. *See* Luger v. Fong, N.D. Office of Admin. Hearings, File No. 20050257 (Dec. 28, 2006) (on file with author).

member Indians' incomes from the state income tax when they live and work on another tribe's reservation.[374]

North Dakota now joins Oregon and Idaho, both of which previously adopted state legislation providing exemption for non-member Indians.[375] Arizona has a cigarette case that follows *Colville*[376] and has taken the position that *Colville* extends to the state income taxation of non-member Indians who live and work on reservations other than their own.[377] We have no definitive answers for California,[378] Minnesota,[379] and Montana,[380] all of which had authority favoring exemption but are now taking different administrative directions.

IV. THE FINAL RESOLUTION

Ultimately, the question of state income taxation of non-member Indians will need to be resolved by the United States Supreme Court. This Article has made the historic case that Indian tribes have occupied a position of political separation from early colonial times to the present. This separation has meant that states have little or no taxing power over tribes, their resources, or those reservation Indians living

374. *See* H.R. 1393, 60th Leg., Reg. Sess. (N.D. 2007) (passed January 3, 2007 and not yet codified), *available at* http://www.legis.nd.gov/assembly/60-2007/bill-text/HANQ0300.pdf.

375. *See* OR. REV. STAT. § 316.777 (2007); IDAHO CODE ANN. § 63-3026A(4)(b)(iv) (2007).

376. *See* Ariz. Dep't of Revenue v. Dillon, 826 P.2d 1186, 1196 (Ariz. Ct. App. 1991) (failing to discuss the "marketing of a tax exemption" logic that Justice White used in *Colville* and failing to consider the effect of the *Duro*-fix legislation).

377. *See In re* Smith, 158 B.R. 818, 818 (Bankr. D. Ariz. 1993) (finding that a Navajo husband of a member of the Hopi Tribe who lived with his wife on her reservation was liable for the Arizona income tax; the court applied *Colville* and *Duro*).

378. California had previously issued a favorable ruling, which it has since withdrawn.

379. The Minnesota Supreme Court decision in *Topash v. Commissioner of Revenue*, 291 N.W.2d 679 (Minn. 1980), was overruled explicitly in *State v. R.M.H.*, 617 N.W.2d 55, 64 (Minn. 2000). The *R.M.H.* case, however, involved Minnesota's assertion of jurisdiction based on its traffic code over a non-member Indian who was driving on a state highway located on a reservation of which he was not a member. *Id.* at 57. To extend this logic to state income taxation is something of a stretch in logic. Accordingly, the Minnesota Supreme Court may have to examine the continuing validity of the *Topash* case.

380. Montana followed New Mexico's early decision in *Fox* and ruled in favor of exemption for a non-member Indian. *See* LaRoque v. State, 583 P.2d 1059 (Mont. 1978). The Wisconsin Supreme Court in its *LaRock* decision stated that the Montana *LaRoque* decision was superseded by promulgation of MONT. ADMIN. R. § 42.15.121(1) (transferred to MONT. ADMIN. R. § 42.15.220 (2007)). My reading of the regulation is that it confirms exemption from state income taxation for Native Americans who live and work on their own reservation but does not answer the non-member Indian question. Finally, I could not find any judicial authority that questions the continuing validity of the Montana Supreme Court's decision in *LaRoque*.

within tribal territory. This makes intuitive sense because we know that the power to tax is the power to destroy. The United States Supreme Court has described states as the foremost enemy of tribes. Since the nineteenth century, state taxing authorities have mounted an unending onslaught in their attempts to tax anything and everything in Indian Country. A current initiative is state income taxation of non-member Indians who live and work on other reservations. As this Article has shown, treating non-member Indians the same as non-Indians ignores their important place in the history of Indian Country and ignores their current roles as mothers and fathers, husbands and wives, members of extended families, federal employees, tribal employees, teachers, lawyers, doctors, accountants, and entrepreneurs. They were and are a critical part of the social, cultural, and political fabric of those communities that we call reservation Indians.

Because he was dealing with cigarettes and the marketing of a tax exemption, Justice White in the *Colville* case saw little reason to align non-member Indians with tribal members. He saw them as passive reservation occupants playing no important role in reservation life. The collective stories of the income tax cases paint an entirely different picture. This picture should be the starting point of the analysis. Justice White admitted that he had no evidence to conclude otherwise. Wisconsin, New Mexico, and Arizona have had the evidence before them but have decided to ignore it in favor of applying a stiff mechanical approach that reads cases carelessly and applies them well beyond their original scope.

When the Supreme Court addresses the issue, it needs to acknowledge that *Colville* is distinguishable from and has been substantially narrowed by *Cabazon.* In addition, *Duro* is of little significance because Congress has decided that the Supreme Court got it all wrong. Accordingly, the Court should start at the beginning and acknowledge the relevant history. This Article shows that no treaties and no federal legislation authorize states to impose their state income tax on non-member Indians who live and work on the reservation of another tribe.

Finally, the Court should concede that allowing state taxation of non-member Indians effectively reduces the tribal tax base. The Court has acknowledged that federally recognized Indian tribes retain the inherent power to tax. In fact, that was a major and positive holding in the *Colville* case. Justice Stewart's dissenting opinion in *Colville*

carefully explains how state and tribal taxation on the same transaction create a problem.[381] For practical purposes, state income taxation, if allowed, prevents or substantially reduces the number and amount of taxes that the tribes can impose. To protect tribal sovereignty, the Court should find tribes immune from state income taxation because Congress has never authorized it and because it would enhance tribal self-government.

381. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 174–76 (1980) (Stewart, J., concurring in part and dissenting in part).

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