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### Tax Burdens and Tribal Sovereignty: The Prohibition on Lavish and Extravagant Benefits Under the Tribal General Welfare Exclusion

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# TAX BURDENS AND TRIBAL SOVEREIGNTY: THE PROHIBITION ON LAVISH AND EXTRAVAGANT BENEFITS UNDER THE TRIBAL GENERAL WELFARE EXCLUSION

Pippa Browde\*

*This article examines a portion of a relatively new federal tax statute, the Tribal General Welfare Exclusion (TGWE), that allows qualified individuals an exclusion from gross income for payments received from American Indian/Alaska Native tribes for any “Indian general welfare benefit.” Indian general welfare benefits are payments made to tribal members by the tribe pursuant to an Indian tribal government program for the promotion of general welfare, such as for health, education, or housing. The TGWE is intended, in part, to promote participation in American Indian tribal cultural and ceremonial practices. To that end, Indian general welfare benefits include payments made for participation in “cultural or ceremonial activities for the transmission of tribal culture.” The statute expressly states that excludable welfare benefits cannot be “lavish and extravagant,” but it does not define what lavish and extravagant means.*

*This article makes the following contributions: It is the first piece of legal scholarship to examine the new TGWE, and it provides in depth description and explanation of the provision. The article also brings attention to federal tax enforcement on certain transfers between tribes and tribal members, particularly those transfers that occur in the scope of tribes engaging in cultural, ceremonial, or religious practices. This article also analyzes a particular limitation in the language of the TGWE, that transfers from tribes to tribal members may not be “lavish and extravagant,” and makes policy recommendations as to the interpretation of that language as the IRS and consulted tribes move forward with interpretative guidance. Finally, on a broader level, this article seeks to contribute to the greater conversations about tribal self-determination and self-governance and the role federal tax law plays as an instrument of those federal Indian policies.*

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*This article proceeds as follows: Part I provides background on the genesis and evolving history of federal Indian policy and the history and general state of federal taxation in Indian country. Part I also explains the TGWE in detail and other pertinent federal tax doctrines and the canons of construction that apply in federal tax law and federal Indian law. Part II analyzes the meaning of the lavish and extravagant standard and how, or to what extent, the limitation prohibiting transfers of benefits that are lavish and extravagant aligns with current federal Indian policy.*

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INTRODUCTION

This article examines a portion of a relatively new federal tax statute, the Tribal General Welfare Exclusion (TGWE), that allows qualified individuals an exclusion from gross income for payments received from American Indian/Alaska Native tribes for “any Indian general welfare benefit.”<sup>1</sup> Indian general welfare benefits are payments made to tribal members by the tribe pursuant to an Indian tribal government program for the promotion of general welfare,

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<sup>1</sup> I.R.C. § 139E(a) (2018). I.R.C. § 139E(a) represents codification of the Tribal General Welfare Exclusion Act of 2014, Pub. L. No. 113–168, 128 Stat. 1883 (2014). Unless otherwise stated, reference to the TGWE is to the codified version of the exclusion. The statutory exclusion is different from an exclusion from gross income for general welfare payments made by tribes that existed as agency-made law prior to the enactment of the statutory exclusion. Any references to the pre-statutory exclusion will be explicit. The Tribal General Welfare Exclusion Act itself contains uncodified language that is discussed throughout this article. References to the uncodified language will also be explicit and refer to the Tribal General Welfare Exclusion Act itself.

such as for health, education, or housing.<sup>2</sup> The TGWE is intended, in part, to promote participation in American Indian tribal cultural and ceremonial practices. To that end, Indian general welfare benefits include payments made for participation in “cultural or ceremonial activities for the transmission of tribal culture.”<sup>3</sup> The statute expressly states that excludable welfare benefits cannot be “lavish or extravagant,” but it does not define what lavish and extravagant means.<sup>4</sup>

Because this article analyzes a legal issue at the intersection of both federal tax law and federal Indian law, a note on terminology is necessary at the outset. Terms used throughout this article include “federal Indian law,” “Indian tribes,” and “Indians.” Federal Indian law refers to “the primary mechanism for mediating the resulting intergovernmental relationships among the Indian nations, the United States, and the states of the Union.”<sup>5</sup> This article will refer to Indian tribes or Indian nations, which “refer to . . . indigenous North American group[s] with which the United States has established a legal relationship.”<sup>6</sup> There is no “single, all-purpose definition” of Indian tribe.<sup>7</sup> In the context of federal Indian law, Indian tribe refers to “a group of native people with whom the federal government has established some kind of political relationship . . . .”<sup>8</sup> For native people, the term Indian tribe connotes “shared language, rituals, narratives, kinship or clan ties, and a shared relationship to specific land.”<sup>9</sup> Indian tribes are more than political sovereigns. They are also cultural and religious sovereigns. The term “Indian tribe” is important in the context of the analysis in this paper because the tax exclusionary provision applies to certain payments made by Tribes to their members.<sup>10</sup>

“The term ‘Indian’ refers either to a member of such a tribe or a person with some specified relationship to such a tribe.”<sup>11</sup> Although there has been a

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<sup>2</sup> *Id.* § 139E(b). The payments may be made in kind or in the form of provision of services, and the recipient may also be a spouse or dependent of a tribal member. *Id.*

<sup>3</sup> *Id.* § 139E(c)(5). The statute speaks of “items of cultural significance, reimbursement of costs, or cash honorarium for participation in cultural or ceremonial activities for the transmission of tribal culture . . . .” *Id.*

<sup>4</sup> *Id.* § 139E(b)(2)(B)–(D). The only additional requirements, not specifically at issue for this research, are that the payments be made pursuant to specific guidelines and may not discriminate in favor of the members of the governing body of the tribe. *Id.* § 139E(b)(1).

<sup>5</sup> COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 1 (Nell Jessup Newton ed., 2012) [hereinafter COHEN’S]. Note that Indian law issues may require analysis of multiple sources of law extending over various legal jurisdictions, including federal law, tribal law, and state law.

<sup>6</sup> *Id.* § 3.01.

<sup>7</sup> *Id.* § 3.02[1].

<sup>8</sup> *Id.* § 3.02[2]. Federal recognition of a tribe, as opposed to tribes only recognized by a state or not recognized at all, lack the formal relationship with the U.S. A formal process exists for tribes seeking federal recognition, including a petitioning process. *See id.* at § 3.02[1] m.2–3 and accompanying text.

<sup>9</sup> *Id.* § 3.02[2].

<sup>10</sup> I.R.C. § 139E(b) (2018).

<sup>11</sup> COHEN’S, *supra* note 5, at § 3.01.

trend in referring to tribal members as “Native American” or “Indigenous,” people on reservations use the term “Indians” to refer to American indigenous people as a group.<sup>12</sup> Again, there is no universal definition of an individual Indian, but a general definition has two qualifications: first, that the ancestors of the individual lived in the United States prior to European contact, and second, the individual is recognized by a tribe or community as such.<sup>13</sup> A person may be considered Indian for one purpose, but not for another, depending on the purpose for which identity as an Indian is relevant.<sup>14</sup> Furthermore, the definitions of what makes an individual “Indian,” may vary between tribes. Tribes have the power to determine their own membership.<sup>15</sup> The inquiry as to who constitutes an Indian for purposes of the exclusion from gross income of certain transfers from an Indian tribe for the most part depends on membership in the tribe.<sup>16</sup> Who constitutes a member of a tribe is relevant to this article because tribal membership determines who is exempt from federal taxation on certain payments by a tribe.<sup>17</sup>

The TGWE is intended to address aspects of the troubled history of federal tax enforcement on transactions in Indian country. The following anecdotes highlight concerns of tribes regarding federal tax enforcement within the sphere of cultural and religious observation of tribal nations.<sup>18</sup>

Consider, for example, the Pueblo of Jemez in Northern New Mexico that has a tradition celebrating with feast days.<sup>19</sup> The feast day is publicly an-

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<sup>12</sup> Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003, 1003 n.1 (1995).

<sup>13</sup> COHEN’S, *supra* note 5, at § 3.03[1] n.2 and accompanying text.

<sup>14</sup> *Id.* § 3.03[1].

<sup>15</sup> *Id.* § 3.03[3] n.25 and accompanying text.

<sup>16</sup> The statute defines the excludable payment as one that is made, “to or on behalf of a member of an Indian tribe (or any spouse or dependent of such a member)[.]” I.R.C. § 139E(b) (2018). Published guidance from the IRS also gives the example where benefits for members to attend “educational, social, or cultural programs offered or supported by the tribe or another tribe” may qualify for the exclusion. Rev. Proc. 2014–35, 2014–26 I.R.B. 1110, § 5.02(2)(e)(v).

<sup>17</sup> See I.R.C. § 139E(b) (exempting from gross income certain transfers from Indian tribal governments made “to or on behalf of a member of an Indian tribe.”).

<sup>18</sup> The following three examples were taken from congressional testimony prior to the enactment of the TGWE. They were raised by Tribal leaders and/or congressional leaders. See *New Tax Burdens on Tribal Self-Determination: Hearing Before the Comm. on Indian Affairs*, 112th Cong. 48 (2012) [hereinafter *Hearings*].

<sup>19</sup> This scenario was described by Senator Udall during congressional testimony. *Id.* at 45 (question posed by Senator Udall in response to the statement of Christie J. Jacobs, Director, Office of Indian Tribal Governments, Internal Revenue Service, U.S. Department of the Treasury). The TGWE is intended to promote Native American culture. Feast days incorporate elements of historical Catholic religious significance, brought by missionaries to New Mexico. As explained:

[F]east days are as much a celebration of ancient Native American traditions and heritage as they are commemorations of Catholic saints. Feast days include traditional dances, cultural activities, food, and arts and crafts. Each dance tells a different story and serves a unique purpose. Every dance is considered a prayer, not a performance, and as such, outsiders are privileged to observe

nounced, and a single household of tribal members will host a meal, feeding up to 200 people.<sup>20</sup> To help with the expense incurred by the family of tribal members who are of modest means, the Jemez Tribe will make a cash distribution to the family.<sup>21</sup> On an audit of the Jemez Tribe, the IRS might take the position that the payment constituted taxable compensation to the tribal member who received the distribution, which would have required that the Tribe issue a Form 1099, an information reporting tax form used to report taxable payments greater than \$600, to the tribal member who received the distribution.<sup>22</sup> This would impose tax consequences on the tribal member who received support from the tribe and expose the tribe to tax penalties for failing to notify the government of the distribution.<sup>23</sup>

Or, as another example, in Pine Ridge, South Dakota, home to the Oglala Lakota Sioux Tribe, the family of a deceased tribal elder lacks the money to pay for the traditional wake and burial rites. The tribe provides financial support to the family for the burial costs, which exceed \$3,000.<sup>24</sup> On audit of the tribe, the IRS requires the tribe to issue a Form 1099 to the family, making the family subject to income tax on the money provided for the funeral.<sup>25</sup>

Yet another example is of the Puyallup Tribe of Indians, a tribe whose reservation lies on an inlet of Puget Sound in Washington, where tribal customs include hosting a pow-wow with other tribes “to come together and celebrate

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them. Drums beat with an insistent cadence, and the air is filled with the fragrance of piñon smoke. . . . Native American feast days allow tribal members to come together in celebration of their language, culture and religion. The communities celebrating feast days are open to the public, and members of the tribe will prepare a variety of bountiful meals to share with guests. Visitors are often fascinated to see that pueblo life is a window into another world. Not relegated to history books or museums, this is a living culture that carries on the centuries-old traditions of ancestors.

*Feast Days*, VISIT ALBUQUERQUE, <https://www.visitalbuquerque.org/about-abq/culture-heritage/native-american/feast-days/> [<https://perma.cc/7QHV-RPUV>] (last visited Feb. 5, 2020).

<sup>20</sup> *Hearings*, *supra* note 18, at 45 (statement of Sen. Udall about details regarding feast days at New Mexico pueblos were used to highlight federal tax enforcement problems in Indian Country).

<sup>21</sup> *Id.*

<sup>22</sup> I.R.C. §§ 6721–24. A payor must submit a Form 1099-Misc to a payee, with a copy sent to the IRS, indicating the amount and date of a taxable payment. *Id.* § 6722. The issuance is significant for both the payor and payee. The payor is required under I.R.C. Section 6041(a) to issue the information returns and is subject to a penalty for failure to do so, on a per report basis. A payee who receives a 1099-Misc. must include the amount reported in gross income, unless otherwise excepted. I.R.C. § 61. There is an administrative process for disputing an erroneously issued Form 1099. The absence of a Form 1099 does not mean that compensation is not includable in the taxable gross income of a recipient, but as a practical matter, it makes it more difficult to enforce the inclusion. *See* I.R.C. § 61(a).

<sup>23</sup> *See id.*

<sup>24</sup> *Hearings*, *supra* note 18, at 5 (statement of Hon. John Yellow Bird Steele, President, Oglala Sioux Tribe).

<sup>25</sup> *Id.*

with songs and dances.”<sup>26</sup> The Puyallup Tribe’s accounting department must issue a Form 1099 to prize winners at the pow-wow, even though the dancing “is not their job and the awards are not intended to compensate them for their dancing.”<sup>27</sup> The monetary awards from the Puyallup Tribe are intended “to celebrate the very best of those who seek to preserve our culture.”<sup>28</sup>

These three examples highlight the types of monetary transfers from an Indian tribe for ceremonial and cultural expression that would seem to be excludable from gross income of the recipient as contemplated by the TGWE. And in each example, the critical questions remain: What might constitute an acceptable, and therefore excludable for tax purposes, transfer, and what would be considered lavish and extravagant?

The TGWE creates an exclusion from gross income for recipients of Indian welfare benefits.<sup>29</sup> Revenue loss to the federal government stems from exclusion by the individual that would otherwise be subjected to tax. From a federal revenue perspective, the exclusion from gross income under the TGWE for transfers to support participation in tribal cultural or ceremonial practices does not represent a significant revenue loss to the federal government.<sup>30</sup> Despite the lack of significant revenue loss, the study of the TGWE is important for two reasons. First, in contrast to the minimal revenue at issue, in practice, federal tax enforcement efforts have been disproportionately aggressive when it comes to transfers between tribes and their members. Second, at the broader policy level, the new statute is an example of Congress using federal tax law as a tool to promote federal Indian policies and to support tribal sovereignty and tribal self-determination.

If a tribe fails to report taxable payments via Forms 1099 or W2, the tribe may be liable for penalties on a per-report basis.<sup>31</sup> In the context of tribes, the

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<sup>26</sup> *Id.* at 69, 71 (statement of Herman Dillon, Sr., tribal Council Chairman, Puyallup Tribe of Indians).

<sup>27</sup> *Id.* at 71.

<sup>28</sup> *Id.* Yet, the last example of IRS enforcement on distributions of “winners” at pow-wow celebrations are subject to income tax and that the prizes of \$600 must be reported on Form 1099-Miscellaneous, is stated IRS policy. *Powwow Prizes Are Taxable*, IRS, <https://www.irs.gov/government-entities/indian-tribal-governments/powwow-prizes-are-taxable> [<https://perma.cc/2FKH-4CEN>] (last visited Feb. 5, 2020).

<sup>29</sup> I.R.C. § 139E(a) (2018); *see infra* note 159 and accompanying text.

<sup>30</sup> The TGWE is a tax expenditure, where the foregone revenue to the government is intended to achieve a social or economic policy goal. Common examples of tax expenditures are those that create deductions for social or economic policy, such as tax credits for children of parents who are low income or tax deductions for home mortgage interest paid, to promote home ownership. I.R.C. § 25A; I.R.C. § 163(h)(3). The author has not been able to find data on the revenue loss at issue here. Even assuming data exists on the revenue loss predicted, under all applications of the TGWE (meaning tribal welfare benefits for housing, medical, education, in addition to benefits for participation in ceremonial or cultural practices), this would not detail the revenue loss per category of benefits. The IRS’s Statistics of Information has no data on any of the potential revenue loss, as it is difficult to track data on exclusions from gross income as opposed to deductions from gross income.

<sup>31</sup> I.R.C. § 6721(a)(1) (imposing a \$100 penalty per return for failure to report).



recipient of otherwise excludable tribal general welfare benefits may also be on the tribe's payroll for other roles served within the tribe's government or other tribal entities. According to Indian tribes and their advocates, the IRS has aggressively pursued federal tax enforcement on transfers between tribes and their members.<sup>32</sup> The unfortunate history of IRS enforcement, through the Indian and Tribal Government division (ITG), has led to tribes having to justify distributions made to their members.<sup>33</sup> What this all means is that tribes struggle with high enforcement rates and are forced to prove a negative, or that payments or distributions are made pursuant to Indian general welfare benefits and not subject to reporting.<sup>34</sup>

Congress and the IRS are aware of the challenges with respect to enforcement of payments by tribes and appear eager to rectify enforcement abuses. The uncodified language of the TGWE provides for suspension of examinations and audits of tribal governments and members to the extent such audits relate to the exclusion of a payment or benefit from an Indian tribal government under the TGWE.<sup>35</sup> The uncodified language also provides for waivers of penalties or interest on tribes or individual recipients, until the ITG division of the IRS receives statutorily proscribed training and education on how to enforce laws in a manner that respects the federal government's "unique legal treaty and trust relationship with Indian tribal governments . . ."<sup>36</sup> Published guidance issued by the IRS after the enactment of the TGWE confirms that the IRS itself is aware of the problems with enforcement.<sup>37</sup>

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<sup>32</sup> See *Hearings, supra* note 18, at 47–48 (testimony of Hon. Lynn Malerba, Chief, Mohegan Tribe: On behalf of the United South and Eastern Tribes, Inc.) (discussing "widespread concern [of tribes] that the [IRS] examinations and audits of Tribal general welfare program benefits are being carried out in a manner that is incompatible with Federal law, treaties, trust responsibility, and the self-determination policy."). The reasons for lopsided enforcement in Indian country are many, but general distrust of tribes as governing entities and the history of resentment of tribes and Indians by non-Indians who perceive Indians as receiving special benefits are discussed *infra* Section II.B.1.

<sup>33</sup> *Hearings, supra* note 18, at 51 (testimony of Hon. Lynn Malerba, Chief, Mohegan Tribe: On behalf of the United South and Eastern Tribes, Inc.) ("The IRS has challenged the benefits provided to tribal cultural leaders who participate in activities that transmit tribal culture as being taxable compensation for services provided. For a tribal official to have to issue a form 1099 to a spiritual leader for the conduct of a traditional ceremony is not only burdensome, but also culturally offensive.").

<sup>34</sup> *Id.* at 40 (testimony of Christie J. Jacobs, Director, Office of Indian and Tribal Governments, Internal Revenue Service, U.S. Department of Treasury) (noting that tribal social programs may come under scrutiny by the IRS when a tribe government is under examination and payments from a tribe in excess of \$600 may not be reported, just as payments made pursuant to the TGWE do not have to be reported).

<sup>35</sup> Tribal General Welfare Exclusion Act of 2014, Pub. L. No. 113-168, 128 Stat. 1883 §§ 3(b)(2), 4(a) (requiring training and education for internal revenue field agents assigned to enforce tax laws with respect to Indian tribes).

<sup>36</sup> *Id.* §§ 3(b)(2)(A), 4(a) (suspending examinations and waiving penalties until training and education completed).

<sup>37</sup> Memorandum from the I.R.S. Office of Chief Counsel (Mar. 19, 2015) (on file at <https://www.irs.gov>).

The second reason this topic is relevant is because, as highlighted by the language prohibiting lavish and extravagant benefits, the TGWE is an opportunity to explore the use of tax law as a tool for social policy. In this case, the social policy is federal Indian policy. In evaluating the efficacy of the tax policy to encourage engagement and participation in traditional Indian cultural and ceremonial practices, it is necessary to examine what lavish and extravagant means. This social policy issue highlights the crux of the problem: the TGWE is intended, in part, to promote participation in tribal cultural activities.<sup>38</sup> Federal policy with respect to tribes favors tribal sovereignty and self-determination.<sup>39</sup> Yet the statute, with its express prohibition on transfers that are lavish and extravagant, restricts tribal sovereignty, especially with respect to promoting tribal culture and ceremonies.

This article makes the following contributions: it is the first piece of legal scholarship to examine the new TGWE, and it provides in depth description and explanation of the provision. The article also brings attention to federal tax enforcement on certain transfers between tribes and tribal members, particularly those transfers that occur in the scope of tribes engaging in cultural, ceremonial, or religious practices. This article also analyzes a particular limitation in the language of the TGWE, that transfers from tribes to tribal members may not be “lavish and extravagant,” and makes policy recommendations for the interpretation of that language as the IRS and consulted tribes move forward with interpretative guidance. Finally, on a broader level, this article seeks to contribute to the greater conversations about tribal self-determination and self-governance and the role federal tax law plays as an instrument of those federal Indian policies.

This article proceeds as follows: Part I provides background on the genesis and evolving history of federal Indian policy and the history and general state of federal taxation in Indian country. Part I also explains the TGWE in detail and other pertinent federal tax doctrines and the canons of construction that apply in federal tax law and federal Indian law. Part II analyzes the meaning of the lavish and extravagant standard and how, or to what extent, the limitation prohibiting transfers of benefits that are lavish and extravagant aligns with current federal Indian policy.

## I. BACKGROUND

This part first lays a foundation for the analysis with the history of federal Indian law and policy and the general rules of federal taxation in Indian coun-

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[://www.irs.gov/pub/irs-wd/201514022.pdf](https://www.irs.gov/pub/irs-wd/201514022.pdf)) (Chief Counsel Advisory opinion dealing with extensions of statutes of limitations for claims for refund arising under the TGWE).

<sup>38</sup> See I.R.C. § 139E(c)(5) (2018); see *infra* notes 158–71 and accompanying text for detailed explanation of the statutory exclusion.

<sup>39</sup> See *infra* notes 123–46 and accompanying text for an overview of current federal Indian policy.

try. Next, this part describes the TGWE, the interpretive administrative law regarding its administration, and the evolution from uncodified administrative rules, including the parallel rules for exclusion of general welfare payments made by non-tribal governmental entities. Finally, this part explains the canons of construction for Indian law and compares them to those canons generally employed for interpreting tax statutes.

A. *The History of Federal Indian Law and Policy*

The analysis of the TGWE lies at the intersection of federal tax law and federal Indian law, applying the canons of construction for Indian law, which are heavily shaped by the history of federal Indian law and policy. It has been written, “[o]ne cannot begin to understand Indian law without acknowledging history and the role it continues to play in shaping the body of . . . Federal Indian [law] . . . .”<sup>40</sup> One reason the history is particularly important in this context is “specific historical events, policy eras, and tribal events can drastically affect the way in which Federal Indian Law applies in a particular instance.”<sup>41</sup> In addition to giving context to the canons of construction, the history is necessary because federal tax law as an instrument of social policy is being used in this case as a tool to effectuate federal Indian policy. The TGWE is not a simple exclusion from gross income but is an opportunity for tribes to make determinations on tribal policy that could have a profound effect on tribal cultural and religious traditions. As explained in detail in the analysis, the history and policy eras in particular weigh heavily in how the ambiguous standard of lavish and extravagant ought to be construed in favor of, and with deference to, Indian tribes.<sup>42</sup>

For those reasons, this article outlines the so-called “eras” of federal Indian policy. Two qualifications are necessary. First, this article provides only the barest background on the history of federal Indian law and policy. Entire volumes are devoted to the history of government-to-government dealings between the United States and Indian nations.<sup>43</sup> The following is but a highly condensed overview of the relationship between Indian nations and the Europe-

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<sup>40</sup> Monte Mills, *Why Indian Country? An Introduction to the Indian Law Landscape*, INDIAN L. & NAT. RESOURCES: BASICS & BEYOND 1, 2 (2017); see also COHEN’S, *supra* note 5, at § 1.01 n.4 and accompanying text (“Historical perspective is of central importance in the field of Indian law.”).

<sup>41</sup> Mills, *supra* note 40, at 2; see also *Hearings*, *supra* note 18, at 71.

<sup>42</sup> See *infra* Section I.D.

<sup>43</sup> See also DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, *UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW* 10–11 (2001) (examining the tribal-federal relationship “through the lens of six critical doctrines of U.S. law: the doctrine of discovery, the trust doctrine, the doctrine of plenary power, the reserved rights doctrine, the doctrine of implied repeals, and the doctrine of sovereign immunity.”). See COHEN’S, *supra* note 5, at §§ 1.01–1.07.

ans who emigrated to the Americas over the last 500 years.<sup>44</sup> Second, the historical policy “eras” outlined represent generalized policy shifts, and “are difficult to demarcate with great precision.”<sup>45</sup> Thus, this section serves to outline the general contours of history most pertinent to the construction of the statutory provision at issue in this article.

1. *Precolonial Times to the 1830s*

The foundation for the legal relationship between tribes and the federal government was set during the years beginning with initial contact between tribes and European settlers through the early part of the nineteenth century. Starting from the initial contact, European settlers were focused on purchasing land from and establishing favorable trade relations with Tribes and individual Indians.<sup>46</sup> Spanish and British colonial law and other European legal traditions set the foundation for how colonists interacted with tribes.<sup>47</sup> Based on these legal traditions, some colonists respected tribes as sovereign entities that had property rights, so it was a matter for colonial governments to negotiate acquisitions.<sup>48</sup> These legal principles were embodied in treaties between various tribes and England, Spain, Holland, and France.<sup>49</sup> Despite these principles that supported government-to-government dealings, colonists did not wholeheartedly respect tribes as equal, and certainly colonists did not treat individual Indians as equal.<sup>50</sup> Tensions between European governments and colonists and the tribes heightened as the colonists, believing Indians to be inferior, sought to apply the doctrine of discovery to seize tribal lands and engaged in deceitful methods for acquiring Indian land.<sup>51</sup>

After the Revolutionary War, the tension between tribes as sovereigns versus notions of conquest was not the only legal and political tension. For the colonists, the fight over which government, local versus more centralized, had

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<sup>44</sup> The author is mindful that while this summary of history may be “necessarily contrived and ultimately somewhat artificial,” it is important context. Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 777–78 (2006). According to Professor Washburn, explanation of the “eras” in history “serves as useful shorthand for understanding the vicissitudes of American Indian policy.” *Id.* at 778.

<sup>45</sup> *Id.* To quote Cohen’s, “Indian law and history are the opposite sides of the same coin.” COHEN’S, *supra* note 5, at § 1.01.

<sup>46</sup> COHEN’S, *supra* note 5, at § 1.02[1] nn.47–48 and accompanying text.

<sup>47</sup> *Id.* § 1.02[1].

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* § 1.02[1] n.52 and accompanying text.

<sup>50</sup> *Id.* § 1.02[1] nn.56–70 and accompanying text.

<sup>51</sup> *See id.* For extensive discussion on the doctrine of discovery, the war against tribalism, and the racist underpinnings of these theories and histories, see ROBERT A. WILLIAMS, *SAVAGE ANXIETIES: THE INVENTION OF WESTERN CIVILIZATION* 224–25 (2012).

the power to deal with Indian affairs became a challenge.<sup>52</sup> Ultimately, at the Constitutional Convention, the power to “regulate [c]ommerce with foreign [n]ations, and among the several States, and with the Indian Tribes,” was reserved to the federal government via Congress.<sup>53</sup>

Despite the language in the federal Constitution regarding federal authority to regulate commerce between the U.S. and tribal governments, the scope of that power and the contours of tribal sovereignty were tested early in the U.S.’s history in disputes between states and tribes. United States Supreme Court jurisprudence addressed issues regarding both the tension between tribes as sovereigns versus the doctrine of discovery and federalism versus state authority over Indian affairs.<sup>54</sup> In a set of three seminal cases, authored by Chief Justice John Marshall and referred to as the Marshall Trilogy, the Supreme Court set the course for the following eras of Indian law and policy.<sup>55</sup>

In the initial case, *Johnson v. M’Intosh*, the Court addressed the limits of tribal sovereignty. In *Johnson v. M’Intosh*, the Court held that tribes retained the right to possess and use their lands, but based on the doctrines of discovery and conquest, the United States acquired “absolute ultimate title.”<sup>56</sup> While the outcome of *Johnson v. M’Intosh* was a blow to the sovereignty of tribes, it highlighted the respect for the treaty tradition between tribes and the federal government, and that such treaties “had a moral and legal force that, while not always respected, was also not easily ignored.”<sup>57</sup>

The second and third cases of the Marshall Trilogy resolved questions about the extent to which states could exercise jurisdiction over Indian affairs. In *Cherokee Nation v. Georgia*, the Supreme Court asserted original jurisdiction over a dispute between the Cherokee Nation and the State of Georgia because the tribe was a “domestic[,] dependent nation.”<sup>58</sup> *Cherokee Nation* established the foundation for the federal government trust obligations to tribes.<sup>59</sup> The third case of the Marshall Trilogy, *Worcester v. Georgia*, also addressed state-tribal conflict.<sup>60</sup> On the issue of whether Georgia laws applied to the

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<sup>52</sup> COHEN’S, *supra* note 5, § 1.02[2] nn.71, 78 and accompanying text. The question over which government ought to have the power to control Indian affairs was an issue at the Continental Congress and in the Articles of Confederation. *Id.*

<sup>53</sup> U.S. CONST. art. I, § 8, cl. 3; *see also* COHEN’S, *supra* note 5, § 1.02[3] nn.111–12 and accompanying text. Prior proposals under the Constitutional Convention did not give federal government over Indian affairs. *Id.* § 1.02[3].

<sup>54</sup> *See* *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 595–96 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831); *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 562–63 (1823).

<sup>55</sup> *See* *Worcester*, 31 U.S. (6 Pet.) at 595–96; *Cherokee Nation*, 30 U.S. (5 Pet.) at 16; *M’Intosh*, 21 U.S. (8 Wheat.) at 562–63.

<sup>56</sup> *M’Intosh*, 21 U.S. (8 Wheat.) at 592.

<sup>57</sup> COHEN’S, *supra* note 5, at § 1.03[1] n.3 and accompanying text.

<sup>58</sup> *Cherokee Nation*, 30 U.S. at 13, 17.

<sup>59</sup> *Id.* at 79.

<sup>60</sup> *Worcester*, 31 U.S. at 536–38.

Cherokee Nation, the Supreme Court held they did not and reaffirmed the supremacy of the federal-tribal treaties as supreme law of the land.<sup>61</sup>

Several foundational principles from the formative era continue to shape Indian law and policy today including that the federal United States government has supreme and broad powers over Indian affairs, tribal self-government matters are generally reserved for the tribe, states have limited jurisdiction in Indian Country, and the U.S. has special trust obligations with respect to Tribes.<sup>62</sup>

## 2. Removal and Creation of Reservations (1830s-1870s)

Despite the promises of the federal government's trust obligations affirmed in *Worcester v. Georgia*, this era marked a period the federal government began to degrade its trust obligations to tribes and Indians. Precipitated by the growth of the population of the United States and westward expansion, the federal government insisted on extinguishing Indian title to land and forcing Indians to move west and onto reservations.<sup>63</sup> The federal government stopped purchasing land from Indian tribes with permanent annuities and instead created reservations of land in the western territories.<sup>64</sup> Tribes increasingly resisted relinquishing their lands, and the United States forcibly removed Indians to western territories.<sup>65</sup> By the 1850s, "the majority of [] Tribes had been removed from the eastern" portion of the United States.<sup>66</sup>

In addition to creating reservations for tribes, the federal government began to convert the title to Indian land from tribal ownership to ownership by individual Indians in what is referred to as allotment.<sup>67</sup> Allotment policies reflected European ideals of individual property rights, but they also reflected a broader cultural and societal belief that Indians ought to be assimilated into mainstream culture.<sup>68</sup> The policies of removing tribes from their land and forcing them on to reservations, or converting tribally or communally owned lands into private-

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<sup>61</sup> *Id.* at 559–60.

<sup>62</sup> See COHEN'S, *supra* note 5, § 1.03[3]. As discussed, *infra* Section I.A.6, these principles and policies have vacillated over the years, but they remain relevant for the current Indian law and policies of self-determination and self-governance.

<sup>63</sup> COHEN'S, *supra* note 5, § 1.03[4][a]; see also *id.* § 1.03[4][a] n.134 and accompanying text.

<sup>64</sup> *Id.* § 1.03[6][b] n.290 and accompanying text.

<sup>65</sup> *Id.* § 1.03[4][a] n.206 and accompanying text; see also *id.* § 1.03[6][a] nn.276–81 and accompanying text. Historically, the California gold rush of the 1850s and the Oregon Trail wagon route of the 1840s marked European immigrants' move to the western part of the United States. *Westward Expansion*, HISTORY, <https://www.history.com/topics/westward-expansion> (last visited Feb. 16, 2020).

<sup>66</sup> *Id.* §§ 1.03[4][a] n.206, 1.03[6][a] n.281 and accompanying text.

<sup>67</sup> *Id.* § 1.03[6][b].

<sup>68</sup> *Id.* § 1.03[6][b] n.285 and accompanying text. This was not just about property ownership but also had racist motivations on behalf of the European immigrants who were attempting to "civilize," the Indian population. *Id.*

ly held lands, set the tone for what became continued disrespect for tribes, Indians, and the Indian way of life. During this period, the federal government established the Department of the Interior and created the position of the Secretary of the Interior to supervise matters of Indian affairs.<sup>69</sup> The Bureau of Indian Affairs (BIA) would come to shape policy for years to come.<sup>70</sup>

At the end of the Removal and Reservation Era, the federal government ceased engaging in government-to-government treaties with tribes and began legislating all Indian policy.<sup>71</sup> No longer engaging in treaties with tribes, willingness to break promises of the trust obligations and remove Indians from their lands and force them westward onto reservations all foreshadowed the coming era of policy.

### 3. *Allotment and Assimilation Era (1870s-1930s)*

Post-Civil War, the broader society was shifting with development of the trans-national railroad and further western expansion.<sup>72</sup> Coupled with rapid industrialization, there was an escalating tension between mainstream society and the traditional hunter-gatherer and nomadic ways of Indian tribes.<sup>73</sup> The prior era foreshadowed the harsh policies to come where the federal government further eroded tribal existence.

The most notable policy proscription (and the one for which the era is named) came from The General Allotment Act of 1887 or Dawes Act. The Dawes Act represented a congressional attempt to fully change the role of Indians in American society by changing the ownership structure of tribal land.<sup>74</sup> The Dawes Act was intended to increase Indian-held land for productive use by tribal members surrendering their undivided interest in tribally owned or trust land for personally assigned individual interest or an allotment, generally to be held in trust for a number of years.<sup>75</sup> Though the prior era had policies supporting allotment, it became mandatory under the Dawes Act.<sup>76</sup> The Dawes Act reduced the number of acres held by tribes from 138 million to forty-eight million within fifty years of enactment.<sup>77</sup>

The communal ownership of land represented the Indian way of life, and thus the Dawes Act was not just about changing who owned the land. It also represented federal policy to alter the traditional, communal ways of Indian

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<sup>69</sup> *Id.* § 1.03[4][b].

<sup>70</sup> *Id.* §§ 1.04–1.07.

<sup>71</sup> *Id.* § 1.03[9].

<sup>72</sup> *Id.* § 1.04.

<sup>73</sup> *Id.* § 1.04 n.3 and accompanying text.

<sup>74</sup> *Id.* § 1.04.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* § 104 n.7 and accompanying text.

<sup>77</sup> *Id.* § 1.04 n.8 and accompanying text.

life.<sup>78</sup> In assimilation, the federal government was trying to make the “American Indian” into an “Indian American.”<sup>79</sup> But assimilating Indians into white culture required more than transferring title to land.<sup>80</sup> Federal law also outlawed traditional Indian conduct, and instead required substitution of European cultural norms.<sup>81</sup> Tribal religious practices such as traditional dances and oral storytelling traditions were criminalized.<sup>82</sup> The federal government instituted programs to give assimilation lessons to Indian children or move them off-reservation altogether, often at religious mission schools, and prohibited use of native languages.<sup>83</sup> During this era, “coercive attempts at assimilation were applied to almost all aspects of Indian’s lives,” including federal oversight over the appropriate length for hair to be worn, funeral rites, hunting, fishing, methods for slaughtering animals, and even appropriate names for people.<sup>84</sup> The federal government encouraged Indians to abandon hunting and gathering traditions and instead engage in agriculture.<sup>85</sup>

As Indian land was allotted, pre-contact farming methods were not sustainable.<sup>86</sup> The U.S. policies of the allotment era caused serious problems for Indian people including starvation, spread of disease, and declining health.<sup>87</sup> In recognition of the declining humanitarian conditions in Indian Country, by the end of the allotment and assimilation era, the BIA was granted general authorization to support the welfare of Indians.<sup>88</sup>

#### 4. *Indian Reorganization (1934-early 1950s)*

The failures of the allotment era and attempts to assimilate individual Indians into mainstream society precipitated a policy shift that corresponded with the New Deal period in American history. The “catalyst for change” in policy was the publication of the Meriam Report, a study conducted over two years by

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<sup>78</sup> *Id.* § 1.04. “[A]llotment, or distribution of Indian lands, was coupled with acculturation, or change of Indian culture and life ways. . . . It is difficult to deal with each of these various issues in isolation.” *Id.*

<sup>79</sup> *Id.* § 1.04 nn.16–17 and accompanying text. At the time, the Commissioner of Indian Affairs posited that only one of two outcomes were possible—either the Indian was to become “civiliz[ed]” or would face “extermination.” *Id.* § 1.04.

<sup>80</sup> *Id.* § 1.04.

<sup>81</sup> *Id.* Federal criminal jurisdiction was established in Indian Country over major crimes, further expanding the reach of the federal government over the lives of Indians. *Id.* § 1.04. n.23 and accompanying text.

<sup>82</sup> *Id.* § 1.04 n.18 and accompanying text.

<sup>83</sup> *Id.* § 1.04 nn.25–27 and accompanying text (documenting efforts to assimilate children); *id.* § 1.04 n.28 and accompanying text (prohibiting use of native language).

<sup>84</sup> *Id.* §§ 1.04, 1.04. nn.29–30 and accompanying text.

<sup>85</sup> *Id.* § 1.04.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* § 1.04 n.31 and accompanying text.

<sup>88</sup> *Id.* § 1.04 n.32 and accompanying text.



the Brookings Institute, which shed light on the “deplorable living conditions” of Indian people.<sup>89</sup>

The new era, referred to as Indian Reorganization, was marked by a reversal of the allotment and assimilation policies and was heralded as a mechanism to stop the loss of Indian held lands and re-establish tribal governments and traditional culture.<sup>90</sup> The policies also reflected congressional tolerance of, if not respect for, the traditional nature of Indian culture.<sup>91</sup> This dramatic reversal resulted in “new protections for Indian rights, support for federally defined tribalism, and encouragement of historical and anthropological concerns such as arts, crafts, native rituals, tourism, and traditional economic systems.”<sup>92</sup>

The era of Indian reorganization is named after the defining legislation, the Indian Reorganization Act of 1934 (also known as the IRA or Wheeler-Howard Act).<sup>93</sup> The objectives of the IRA were to improve economic status of tribes by preventing further loss of tribal lands and to assist with tribal land acquisition or re-acquisition of land lost through prior allotment.<sup>94</sup> The IRA sought to accomplish those goals by prohibiting any further allotments and had various mechanisms designed to ensure trust protection of tribal lands and prevent transfers of restricted tribes.<sup>95</sup>

The IRA was not a perfect solution to the woes created by years of policies aimed at assimilation. Participation in the IRA was voluntary, and response was varied with some tribes refusing to participate.<sup>96</sup> The IRA also did not give absolute sovereignty to tribes; instead it allowed tribes to manage all tribal affairs subject to BIA approval, creating a tribal government to run as a mini-federal government under the federal supervision.<sup>97</sup> The BIA continued to have supervisory approval of almost all Indian actions, limiting tribal autonomy.<sup>98</sup>

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<sup>89</sup> *Id.* §§ 1.05, 1.05 n.2 and accompanying text.

<sup>90</sup> *Id.* § 1.05 n.1 and accompanying text.

<sup>91</sup> *Id.* § 1.05.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* § 1.05 n.8 and accompanying text.

<sup>94</sup> *Id.* § 1.05 nn.8–9 and accompanying text. Other significant legislation of this period included the Leavitt Act of 1932 (authorizing the Secretary of Interior to discharge debts of tribes for construction work on reservation infrastructure projects), *id.* § 1.05 n.4 and accompanying text, and the Johnson-O'Malley Act of 1934 (allowing the BIA to contract with states for basic services to tribes and welfare of tribal members). *Id.* § 1.05 n.6 and accompanying text.

<sup>95</sup> COHEN'S, *supra* note 5, § 1.05. The IRA also gave tribes various transactional and governmental protections, such as permitting tribes to adopt constitutions and form business entities. *Id.* § 105 n.10 and accompanying text.

<sup>96</sup> *Id.* § 1.05 n.17 and accompanying text (tribe can reject IRA with majority voting to opt out). Tribes who opted out continued under existing tribal government structures or with no organized structure. *Id.* Many larger tribes rejected application of the IRA. *Id.* § 1.05 n.13 and accompanying text.

<sup>97</sup> Mills, *supra* note 40, at 11 (“The Act itself offered little additional authority to tribes beyond the inherent sovereign rights they had always enjoyed . . .”).

<sup>98</sup> COHEN'S, *supra* note 5, § 1.05.

The IRA was successful at stemming the tide on the loss of land from tribes and promoting “better and more efficient use” of tribal resources.<sup>99</sup> In that respect, the IRA was certainly an improvement from the policies of allotment and assimilation, but it was not a fix. Conditions remained challenging, and the damage of the prior eras to tribes and individual Indians was not easily rectified. Coupled with the economic conditions of the Depression era, the underfunded BIA was unable to provide meaningful relief to destitute conditions in Indian country.<sup>100</sup> As the United States went into the Second World War, with strained economic conditions and lack of optimism about the efficacy of the IRA, the pendulum started to move again towards policies that would be even more detrimental to tribes and Indian people.<sup>101</sup>

##### 5. *Termination Era (1950s-1960s)*

Following World War II, the policy pendulum reversed again as Indians were “caught . . . [in] post-war economic and political forces demanding less government, more independent economic opportunities, reduced federal expenditures, and decentralized local and state operations.”<sup>102</sup> Congress relied on a study called the “Survey of Conditions Among the Indians of the United States,” which disavowed the success of the IRA, particularly with respect to how Indian lands and tribal resources and how federal funds were used for trust obligations under the IRA.<sup>103</sup> The overall policy goal consisted of “terminat[ing] the federal-tribal relationship and perceived special status” of Indians in a “gradual and systematic termination,” of tribes as governments.<sup>104</sup> Pressed by the strains of post-war economic conditions and with the study as empirical support, Congress began to work to more fully assimilate individual Indians.<sup>105</sup> This represented a return to the policies from the era of allotment and assimilation and resulted in modification of all existing federal programs under the BIA that touched every aspect of Indian life, from tribal land ownership and management, to natural resource development, to health, education and welfare, and even state and federal taxation.<sup>106</sup> The legislative proposals of the Termination Era were aimed at reducing and substantially modifying the restrictions in the IRA, if not eliminating them, and to eliminate the BIA entirely.<sup>107</sup>

The Termination Era policy was shaped by both economic and ideological forces.<sup>108</sup> The economic issues involved interests in developing and accessing

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.* § 1.05 n.20 and accompanying text.

<sup>101</sup> *Id.* § 1.05.

<sup>102</sup> *Id.* § 1.06.

<sup>103</sup> *Id.* § 1.06 nn.3–4 and accompanying text.

<sup>104</sup> *Id.* § 1.06.

<sup>105</sup> *Id.* § 1.06 n.4 and accompanying text.

<sup>106</sup> *Id.* § 1.06 n.7 and accompanying text.

<sup>107</sup> *Id.* § 1.06.

<sup>108</sup> *Id.*

natural resources within Indian country and on tribal lands and opposition to federal budgets for the BIA and Indian programs.<sup>109</sup> The ideological forces were cultural opposition to the anti-Christian nature of tribal life and religious practices.<sup>110</sup>

In an early policy statement in favor of terminating tribal governments, Congress called for an investigation of the BIA and for proposals to achieve the goals of eliminating the federal government's trust obligation and to ensure termination.<sup>111</sup> Without waiting for evaluations or individualized study of the needs and conditions of tribes,<sup>112</sup> Congress quickly passed legislation intending the end the federal government's trust obligations.<sup>113</sup>

Congress passed laws that terminated the federal government's trust obligations with respect to individual tribes.<sup>114</sup> Termination essentially amounted to the distribution of communally held tribal assets that had been held by the federal government in trust to individual tribal members.<sup>115</sup> The termination bills had common features, namely they set periods from two to five years to complete the termination process and prepared final accounting for dividing tribal assets among individual Indians.<sup>116</sup>

Other federal efforts were made to move Indians off reservations and assimilate them into mainstream society. For example, a "[v]oluntary [r]elocation [p]rogram" was established for defense workers and veterans who were Indian, providing travel and subsistence allowance and placing them in jobs off-reservation.<sup>117</sup> Such programs were an overall failure because there were insufficient or inadequate work opportunities, and once they relocated, there were no services to help Indians adjust to the cultural immersion. Many who relocated returned to their reservations.<sup>118</sup>

The consequences of termination on tribes were devastating, both economically and culturally. Termination ended federally funded programs for Indians and tribes to promote health, education, and welfare, including housing assistance and social programs.<sup>119</sup> The loss of tribal lands weakened tribal sovereignty because tribes were unable to exercise governmental powers without a land base.<sup>120</sup>

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* § 1.06 n.19 and accompanying text. Congressional policy was declared in a 1953 House Concurrent Resolution, H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (Aug. 1, 1953).

<sup>112</sup> COHEN'S, *supra* note 5, § 1.06 n.20 and accompanying text.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* § 1.06 n.23 and accompanying text.

<sup>115</sup> *Id.* § 1.06.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* §§ 1.06, 106 n.12 and accompanying text.

<sup>118</sup> *Id.* § 1.06, n.13 and accompanying text.

<sup>119</sup> *Id.* § 1.06.

<sup>120</sup> *Id.* § 1.06. n.26 and accompanying text.

As the federal government ceased to provide its trust obligations, responsibility for all aspects of government support to tribes transferred to the states.<sup>121</sup> Not all tribes were “terminated” by congressional legislation, but even those tribes not terminated felt the lasting effect, such as with the changes in criminal laws and the de-regulation of Indian lands and resources.<sup>122</sup> The ultimate consequences of termination were further degradation of tribal sovereignty, an increase in poverty, and failed assimilation of individual Indians.

#### 6. *Self-Determination and Self-Governance (1960s to Present)*

The Termination Era was short lived in terms of number of years but devastating in the period’s effect on Indian tribes and tribal culture. Starting in the early 1960s, the policies supporting New Federalism and the War on Poverty were gaining momentum, as was the civil rights movement.<sup>123</sup> Parallel policy shifts transpired with respect to Indian affairs, increasing acknowledgment of the need for stronger relationships between tribes and the federal government.<sup>124</sup> By the late 1950s, policy leaders began to return to policy goals of the Indian Reorganization era.<sup>125</sup>

The era of self-governance and self-determination is “premised on the principle that Indian tribes are . . . the primary or basic governmental unit of Indian policy.”<sup>126</sup> Two federal statutes declared and implemented these policies: the Indian Self-Determination and Education Assistance Act of 1975 (Self-Determination Act)<sup>127</sup> and the Tribal Self-Governance Act of 1994 (Self-Governance Act).<sup>128</sup> The Self-Determination Act allowed tribes to administer

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<sup>121</sup> *Id.* § 1.06. With the shift from federal to state governmental support, states imposed legislative authority over all terminated tribes on a broad range of matters including education, land use, adoption and state taxation. *Id.* § 1.06 n.25 and accompanying text. The shift to state jurisdiction in Indian Country included key changes in criminal and civil jurisdiction, such as passage of Public Law 83-280, known as P.L. 280, which mandated that specific states assume such jurisdiction. *Id.* § 1.06 at n.27 and accompanying text.

<sup>122</sup> *Id.* § 1.06.

<sup>123</sup> *Id.* § 1.07. United States presidents articulated the new policies toward Indian affairs. For example, President Lyndon Johnson proposed “a new goal for our Indian programs: A goal that ends the old debate about ‘termination’ of Indian programs and stresses self-determination [as] a goal that erases old attitudes of paternalism and promotes partnership and self-help.” *Id.* § 107 n.16 and accompanying text. President Richard Nixon rejected the extremism of termination (which “ignore[s] the moral and legal obligations” of the federal government with respect to tribes) and paternalism (which he said “‘ero[des] . . . Indian initiatives and morale.’”). *Id.* § 107 n.17 and accompanying text. This evolution of Indian affairs policies was also triggered by a growing national concern for ethnic and racial minorities. *Id.* § 107 n.4 and accompanying text.

<sup>124</sup> *Id.* § 1.07.

<sup>125</sup> *Id.* § 1.07 n.2 and accompanying text.

<sup>126</sup> *Id.* § 1.07.

<sup>127</sup> *Id.* § 1.07 n.31 and accompanying text.

<sup>128</sup> *Id.* § 1.07 n.32 and accompanying text.

programs that had previously been run by the BIA.<sup>129</sup> The Self-Determination Act “allowed tribes to contract to run health, education, economic development, and varied social programs themselves,”<sup>130</sup> and essentially encouraged Indian participation in federal programs historically run by the BIA.<sup>131</sup>

The Tribal Self-Governance Act arose in response to a trial project that gave tribes block grants and allowed them budgeting authority.<sup>132</sup> The Self-Governance Act allows eligible tribes to engage in self-governance compacts, giving tribes more independence and the opportunity to self-govern.<sup>133</sup> Both Acts give tribes the chance for tribal governments to provide services that were previously provided by the federal government.<sup>134</sup> These two pieces of legislation set the stage for subsequent federal legislation involving Indian affairs that reflects a theme of “the protection and extension of tribal culture and life . . . .”<sup>135</sup>

Another more recent legislative enactment is the Indian Gaming Regulatory Act (IGRA) of 1988, which allows tribes to engage in gaming operations apart from state regulation.<sup>136</sup> The federal statutes regulate gaming policy and types of gaming.<sup>137</sup> IGRA also provides the federal framework for states and tribes to enter into gaming compacts.<sup>138</sup>

Other notable legislation supporting tribal culture includes “the Indian Child Welfare Act, the Archaeological Resources Protection Act, the National Museum of the American Indian Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Tribally Controlled Schools Act, and the Indian Arts and Crafts Act.”<sup>139</sup>

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<sup>129</sup> Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. § 450); COHEN’S, *supra* note 5, § 1.07 n.31 and accompanying text.

<sup>130</sup> COHEN’S, *supra* note 5, § 1.07.

<sup>131</sup> *Id.*

<sup>132</sup> Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250 (1994) (codified at 25 U.S.C. § 450); Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 26–27 (2015).

<sup>133</sup> COHEN’S, *supra* note 5, § 1.07.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* Such subsequent federal legislation includes “the Indian Child Welfare Act, the Archaeological Resources Protection Act, the National Museum of the American Indian Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Tribally Controlled Schools Act, and the Indian Arts and Crafts Act.” *Id.* § 1.07 nn.38–44 and accompanying text.

<sup>136</sup> Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 15 U.S.C. § 2701); COHEN’S, *supra* note 5, § 1.07 n.36 and accompanying text.

<sup>137</sup> COHEN’S, *supra* note 5, § 1.07 n.36 and accompanying text.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* § 1.07 nn.38–44 and accompanying text.

There was also the enactment of the federal Indian Civil Rights Act of 1968 (ICRA).<sup>140</sup> ICRA “limits the power of tribal governments by applying” a portion of the federal Bill of Rights—Due Process and Equal Protection—to Indian tribes.<sup>141</sup> ICRA, however, did not incorporate the portion of the Bill of Rights containing the Establishment Clause, preserving the independence of tribes to function as religious and cultural sovereigns.<sup>142</sup>

In light of the history of federal policies directed at replacing traditional tribal religious beliefs and practices with Christian rituals for much of the nineteenth and twentieth centuries, religious freedom for tribes has been described as being “deeply connected to any policy of self-determination and cultural survival.”<sup>143</sup> Federal legislation enacted in the late 1970s affirmed the federal government’s current policy “to protect and preserve” inherent religious freedoms of American Indians.<sup>144</sup>

Overall, the era of self-governance and self-determination focused on “economic development of Indian land, better utilization of . . . human resources, and protection of [the] tribal [and] reservation environment.”<sup>145</sup> The impact of the self-determination may be measured by the relative successes tribal programs and practices have with respect to delivery of health care, promotion of tribal languages, and development of tribal justice systems. As commentators note, in the 500 plus years of Indian policy reflecting vacillations in attitudes, since the 1960s the policy for self-determination has been “relatively stable,” with “strong emphasis on Native American decision making, economic development and cultural preservation and extension.”<sup>146</sup>

### B. Federal Taxation in Indian Country

The U.S. Constitution explicitly states, “Indians [are] not taxed.”<sup>147</sup> In the earlier part of the history of the United States, there was no federal income tax

<sup>140</sup> *Id.* § 1.07 n.21 and accompanying text.

<sup>141</sup> *Id.* § 1.07. ICRA was/remains controversial legislation. *Id.* § 1.07 n.21 and accompanying text. As Cohen’s notes: “A major task of the self-governance era has been to create new structures for decision making and program administration at the tribal level.” *Id.* § 1.07.

<sup>142</sup> *Id.* § 1.07.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* § 1.07 n.62 and accompanying text (citing Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified as amended at 42 U.S.C. § 1996)) (protecting freedom to believe, express, and exercise).

<sup>145</sup> *Id.* § 1.07.

<sup>146</sup> *Id.*

<sup>147</sup> U.S. CONST. art. I, § 2, cl. 3. At the time the U.S. Constitution was adopted through the 1870s, Congress entered treaties with Indian tribes in a formative period of American Indian law. COHEN’S, *supra* note 5, § 1.03[1]. The tribes had a weaker bargaining position in negotiating the treaties, but the treaties themselves “had a moral and legal force that, while not always respected, was also not easily ignored.” *Id.*; *16<sup>th</sup> Amendment to the U.S. Constitution: Federal Income Tax (1913)*, OURDOCUMENTS.GOV, <https://www.ourdocuments.gov/doc.php?flash=false&doc=57> (last visited Feb. 17, 2020).

imposed on anyone, Indian or otherwise.<sup>148</sup> Despite the language of the Constitution, current interpretation of federal tax law is that individual Indians are generally subject to federal income, estate, and gift taxes.<sup>149</sup> Thus, individual “Indians must [generally] include in gross income their pro rata shares of tribal income” when distributed by the tribe.<sup>150</sup> Indian tribes themselves are not subject to tax, including income generated by tribes via federally chartered Indian tribal corporations.<sup>151</sup>

Some types of income to individual Indians, such as payments under specific treaties,<sup>152</sup> statutory rights, and income from restricted trust allotments are

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<sup>148</sup> Compare U.S. CONST. art. I, § 9, cl. 4, with U.S. CONST. amend. XVI. The 16th Amendment was ratified in 1913, and that same year marked the imposition of the first federal income tax.

<sup>149</sup> *Squire v. Capoman*, 351 U.S. 1, 6 (1956); *Choteau v. Burnet*, 283 U.S. 691, 696 (1931).

<sup>150</sup> BORRIS I. BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* ¶ 1.2.9 (3d ed. 1999).

<sup>151</sup> *Id.* Indian tribal corporations organized under state laws are subject to federal tax. *Id.*

<sup>152</sup> The federal government entered treaties with tribes, generally, through the Removal and Reservation Era. See *supra* note 71 and accompanying text. The federal government’s treaties with tribes varied, but common elements included a “guarantee of peace, a delineation of [land] boundaries . . . guarantee[s] of Indian hunting and fishing rights . . . and an agreement regarding the regulation of trade and travel of persons in the Indian territory.” WILLIAM C. CANBY JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 115–16 (5th ed. 2009).

In some ways, these treaties are no different than treaties between the federal government and foreign nations. See *id.* at 118 (“A treaty between the United States and an Indian tribe is a contract between two sovereigns . . .”). The federal government frequently enters into tax treaties with foreign countries regarding the U.S. tax consequences of foreign nationals. See RICHARD E. ANDERSEN, *ANALYSIS OF UNITED STATES INCOME TAX TREATIES* ¶ 1.01 (2010) (noting purposes of income tax treaties: promotion of international trade and investment, avoidance of double taxation, reduction of taxation at source, avoidance of discrimination, competent authority for dispute resolution, information exchange, and other administrative assistance). The treaties the federal government entered into with tribes highlight the disparity between congressional goals with respect to cross-border trade and the lack of similar goals, through the enactment of exemptions or the entering in treaties, with respect to tribes.

Most curious, however, is a federal tax provision that exempts some foreign earned income of U.S. nationals who are residing abroad. See I.R.C. § 911 (2012). Section 911 allows a U.S. citizen who resides abroad for an uninterrupted period to exclude up to \$103,900 (adjusted to inflation for 2018) from gross income for federal income tax purposes. *Id.* § 911(b)(2)(D). The foreign-earned-income-tax exclusion had two primary purposes: alleviate double taxation concerns for U.S. citizens residing abroad (who would be subject to foreign income taxes and U.S. income taxes on their foreign source income) and to “decrease barriers to foreign trade.” Webster Beary, Note, *Section 911: The Foreign Earned Income Inclusion? Using Clark v. Commissioner to Demonstrate How Courts Have Improperly Narrowed the Scope of Section 911*, 62 *TAX LAW.* 897, 899 (2009). Section 911 however also had broader goals that include: “equity between United States expatriates and domestic taxpayers . . . increased employment of Americans, leading to increased exports and goodwill . . . improved ability to compete . . . avoidance of double taxation and the crediting of unrecieved governmental services.” *Id.* at 908 (internal quotation marks omitted).

Curiously, there exists no similar provision to exempt income earned by a member Indian who resides within a tribal territorial jurisdiction and earns income from sources entirely within the tribe or apart from the U.S, other than historical treaties or statutes regarding tribal resources.

properly excludable from gross income.<sup>153</sup> These specific exclusions are based on case law interpreting whether Congress intended a tax exemption under the language of the applicable treaty or statute<sup>154</sup> or by the statutory exclusion itself.<sup>155</sup> Absent the specific exclusionary rule discussed below, payments by a tribe to its members for whatever purpose, including for health, education, housing and medical care, would be includable in the individual's gross income for federal tax purposes.<sup>156</sup>

### C. *The Statutory TGWE, Interpretative Guidance, and the Evolution*

The history of federal Indian law and policy and the federal tax status of tribes and their individual members sets the stage for the TGWE. In an exercise of self-determination, tribes went to Congress to enact a statute to ensure consistent and fair enforcement, and to protect tribes from the IRS, particularly in the area of ceremony and cultural practices.<sup>157</sup> This subpart examines the statutory language and IRS published guidance regarding the statute. It also examines the history of IRS rules on the TGWE and the non-tribal counterpart, a general welfare exclusion.

#### 1. *The Statutory Tribal General Welfare Exclusion*

In 2014, President Obama signed the Tribal General Welfare Exclusion Act into law, codifying long-standing administrative rules that provided for an exclusion from gross income for certain payments made by tribes to their members.<sup>158</sup> The statutory tribal general welfare exclusion provides an exclusion from gross income by the recipient of "any Indian general welfare benefit."<sup>159</sup> Indian general welfare benefit includes payments made to a member, spouse, or dependent of such member, of an Indian tribe pursuant to an "Indian tribal government program . . . ."<sup>160</sup> Payment may be made in cash, property or

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<sup>153</sup> *Squire*, 351 U.S. at 6; BITTKER & LOKKEN, *supra* note 150, at ¶ 1.2.9. Also, the TGWE is another exclusion. *See infra* Section I.C.1.

<sup>154</sup> *Squire*, 351 U.S. at 6–7.

<sup>155</sup> I.R.C. § 7873(a)(1) (exempting from tax income generated from treaty fishing rights).

<sup>156</sup> *See infra* Section I.C.1.

<sup>157</sup> This is particularly evident in the language of the Act because it provides for consultation with Tribal Advisory Committee, that the canons of construction for Indian law apply, and requires the IRS to stay enforcement pending appropriate training and education of the ITG revenue agents. I.R.C. § 139E (2018).

<sup>158</sup> Tribal General Welfare Exclusion Act of 2014, Pub. L. No. 113-168, 128 Stat. 1883 (2014) (codified as I.R.C. § 139E).

<sup>159</sup> I.R.C. § 139E(a) (2018). In addition to direct payments, paragraph (b) of Section 139E also includes payments made on behalf of or services provided to a qualifying individual. *Id.* § 139E(b).

<sup>160</sup> *Id.* § 139E(b). The statute defines "Indian tribal government" to include "any agencies or instrumentalities of an Indian tribal government and any Alaska Native regional or village corporation, as defined in, or established pursuant to, the Alaska Native Claims Settlement Act." *Id.* § 139E(c)(1). The statute provides that the establishment of an "Indian tribal gov-



in kind, or on behalf of the recipient.<sup>161</sup> For the payment to be excludable from gross income, the statute restricts the Indian tribal government program and requires such program to be administered under specific guidelines and available to all members (or dependents and spouses), not just those who participate in tribal governance.<sup>162</sup> Additional restrictions in the statute require that the benefits of such a program are:

- (A) “available to any tribal member who meets [the] guidelines,”
- (B) for “promotion of general welfare,”
- (C) “not lavish or extravagant, and
- (D) [] not compensation for services.”<sup>163</sup>

These four restrictions are designed to ensure the following: First, the requirement that the benefits be “available to any tribal member who meets such guidelines,” is intended to ensure that the benefits are widely available to qualified recipients.<sup>164</sup> Second, that the benefits be for “promotion of general welfare,” imposes a need-based requirement for the recipient.<sup>165</sup> Both of these restrictions have important practical considerations for tribes wishing to comply with the requirements for the TGWE as to how to structure guidelines for benefits and ensure that said benefits are for supporting general welfare, as opposed to being distributed on a per-person basis.<sup>166</sup> Such considerations are beyond the scope of this article.

The last two restrictions, that the benefits not be “lavish or extravagant,” and not represent “compensation for services,” are germane to this article.<sup>167</sup> As a foundational principle and general proposition, any transfer in exchange for services is considered taxable income to the recipient, regardless of whether cash or property is transferred.<sup>168</sup> The statutory language carving out compensation for services from the types of payments or transfers that qualify for the TGWE is therefore redundant under existing tax law that requires any compensation received for services to be included in gross income. The TGWE uses

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ernment program” to provide benefits excludable under the statute “shall not fail . . . solely by reason of the program being established by tribal custom or government practice.” *Id.* § 139E(c)(4). This provision has important ramifications for an Indian tribal government program that is established under cultural traditions as opposed to existing via tribal legislative process.

<sup>161</sup> *Id.* § 139E(b).

<sup>162</sup> *Id.* § 139E(b)(1).

<sup>163</sup> *Id.* § 139E(b)(2).

<sup>164</sup> *Id.* § 139E(b)(2)(A).

<sup>165</sup> *Id.* § 139E(b)(2)(B).

<sup>166</sup> The requirement that the benefits be for “general welfare” has origins in administrative exclusion for non-tribal governmental welfare benefits, *see infra* Section I.C.3, and possibly also because of concern that tribes would use the TGWE as an opportunity to mask taxable per-capita distributions of gaming revenues as tax free distributions. *See infra* note 239 and accompanying text.

<sup>167</sup> I.R.C. § 139(b)(2)(C)–(D).

<sup>168</sup> *Id.* § 61(a)(1); 26 C.F.R. § 1.61–1(a) (2012) (income includes payment in kind); *id.* § 1.61–2(a) (income includes compensation for services).

the redundant statement as an opportunity to carve out a special rule, and the TGWE then provides that receipt of “[a]ny items of cultural significance, reimbursement of costs, or cash honorarium for participation in cultural or ceremonial activities for the transmission of tribal culture [will] not be treated as compensation for services,” and thus otherwise qualifies for exclusion.<sup>169</sup>

Recognizing that the lavish and extravagant limitation is ambiguous, the codified statutory language of the TGWE provides that the Secretary of the Treasury (presumably designated to the IRS), shall consult with a Tribal Advisory Committee to “establish guidelines for what constitutes lavish or extravagant benefits with respect to Indian tribal government programs.”<sup>170</sup> The uncodified language of the Tribal General Welfare Exclusion Act specifies the membership makeup and duties of the Tribal Advisory Committee.<sup>171</sup> As of the writing of this article, no guidance has been issued by the Tribal Advisory Committee interpreting what lavish and extravagant means under the TGWE.

## 2. *Published IRS Guidance Interpreting the TGWE*

The TGWE essentially mirrors a pre-codified version of the exclusion.<sup>172</sup> Following the enactment of the statutory exclusion, the IRS issued published guidance in Notice 2015-34 that stated the codification of the TGWE does not supplant the IRS’s prior guidance for “general welfare exclusion for certain benefits provided under Indian tribal government programs.”<sup>173</sup> Notice 2015-34 references Revenue Procedure 2014-35 (the Revenue Procedure), which was published just prior to the enactment of the statutory TGWE.<sup>174</sup> The Revenue Procedure provides safe harbors for Indian tribal governmental programs to satisfy the requirement of being based on individual need for general welfare exclusions.<sup>175</sup>

The Revenue Procedure provides a bright-line safe harbor list of types of benefit programs a tribe might administer that are deemed to satisfy the re-

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<sup>169</sup> I.R.C. § 139E(c)(5).

<sup>170</sup> *Id.* § 139E(c)(3) (establishing guidelines for what constitutes lavish and extravagant in consultation with a Tribal Advisory Committee) The special rules also define the terms “Indian Tribal Government” and “dependent.” *Id.* § 139E(c)(1)–(2).

<sup>171</sup> Tribal General Welfare Exclusion Act of 2014, Pub. L. No. 113-168, § 3, 128 Stat. 1883, 1884 (2014). The duties of the Tribal Advisory Committee are to advise the IRS “on matters relating to the taxation of Indians” and provide advice to the IRS on the training and education of IRS field agents working in Indian country. *Id.* § 3(b). The law requires there to be seven members of the Committee for staggered terms of four years, three of whom are to be appointed by the IRS and the remaining four to be appointed by congressional leaders. *Id.* § 3(c).

<sup>172</sup> Pre-statutory versions of the administrative doctrine include Rev. Rul. 2005-46, 2005-2 C.B. 120; I.R.S. Notice 2003-18, 2003-1 C.B. 699; Rev. Rul. 82-106, 1982-1 C.B. 16; Rev. Rul. 75-246, 1975-1 C.B. 24.

<sup>173</sup> I.R.S. Notice 2015-34, 2015-18 I.R.B. 942.

<sup>174</sup> *Id.*

<sup>175</sup> Rev. Proc. 2014-35, 2014-26 I.R.B. 1110, § 1.

quirement that the benefit addresses individual need.<sup>176</sup> The list identifies specific programs to address housing, educational needs, elder and disabled assistance, and other qualifying assistance.<sup>177</sup> If a tribe makes a payment pursuant to a program articulated in the safe harbor, the requirement that the benefit be for general welfare is presumed.<sup>178</sup>

The Revenue Procedure elaborates on the exclusion for benefits to pay expenses or costs related to cultural and religious programs that satisfy the individual need requirement.<sup>179</sup> It specifically lists programs that pay expenses for an individual “to attend or participate in an Indian tribe’s cultural, social, religious, or community activities,”<sup>180</sup> “to visit sites that are culturally or historically significant for the tribe,”<sup>181</sup> and to receive “instruction about an Indian tribe’s culture, history, and traditions,”<sup>182</sup> all of which fall within the safe harbor for individual need. Similarly, the Revenue Procedure specifies that programs that pay funeral and burial expenses, including hosting and attending wakes or other bereavement events, also fall within the safe harbor for cultural and religious programs.<sup>183</sup> As a general catch all, the Revenue Procedure also provides that payments of transportation and admission costs to attend “educational, social, or cultural programs,” are within the safe harbor, whether offered by the individual’s tribe or another tribe.<sup>184</sup>

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<sup>176</sup> *Id.* § 5.02(2). Revenue Procedure 2014-35 was issued in response to I.R.S. Notice 2012-75, 2012-51 I.R.B. 715, and comments received in response to that notice. Revenue Procedure 2014-35 contains twenty-nine enumerated changes in response to the comments on Notice 2012-75. The changes all represent expansions, additions or clarifications in the language from the earlier Notice 2012-75. *Id.* § 2.06(1)–(29). None of the changes represent a departure from the general policies or purpose of the original notice. *Id.*

<sup>177</sup> *Id.* § 5.02(2)(a) (benefits for the acquisition, maintenance, improvement of housing); *id.* § 5.02(2)(b) (benefits for educational expenses and attending costs); *id.* § 5.02(2)(c) (benefits for elder care); *id.* § 5.02(2)(d) (benefits for “[o]ther qualifying assistance programs.”). The “[o]ther qualifying assistance programs” all relate to programs that provide benefits to pay for transportation and personal living expenses for an individual to obtain services, such as medical care away from home, or for assistance with exigent circumstances and emergencies. *Id.* § 5.02(2)(d).

<sup>178</sup> *Id.* § 5.01(1). This article is focused on the implications of the lavish and extravagant limitation as it relates to benefits for the promotion of tribal cultural and ceremonial practices only. There are practical considerations for tribes as to how to administer tribal general welfare benefits for housing, medical, and educational expenses to ensure that such benefits are not lavish and extravagant. These considerations are outside the scope of this article.

<sup>179</sup> *Id.* § 5.02(2)(e)(i)–(v).

<sup>180</sup> *Id.* § 5.02(2)(e)(i). The Revenue Procedure provides examples of such activities as “powwows, ceremonies, and traditional dances.” *Id.*

<sup>181</sup> *Id.* § 5.02(2)(e)(ii). The Revenue Procedure also states that such sites might include another Indian reservation. *Id.*

<sup>182</sup> *Id.* § 5.02(2)(e)(iii). The education includes, but is not limited to, instruction on “traditional language, music, and dances . . .” *Id.*

<sup>183</sup> *Id.* § 5.02(2)(e)(iv). The Revenue Procedure refers to funerals, burials, and “subsequent honoring events . . .” *Id.*

<sup>184</sup> *Id.* § 5.02(2)(e)(v).

The Revenue Procedure states that benefits provided under an Indian tribal governmental program to religious or spiritual officers or leaders “to recognize their participation in cultural, religious, [or] social events” that are “items of cultural significance that are not lavish or extravagant,” or represent “nominal cash honoraria” will not be considered compensation for services for purposes of the general welfare exclusion.<sup>185</sup>

### 3. *The General Welfare Exclusion for Benefits Provided by Non-Tribal Governments*

In addition to the TGWE, which existed for decades as administrative rule prior to codification, there also exists a parallel doctrine, called the general welfare exclusion, for welfare benefits paid by non-tribal governments.<sup>186</sup> This exclusion is usually referred to as the general welfare exclusion (GWE).

The GWE is an administrative doctrine, created by the IRS.<sup>187</sup> The GWE provides that certain payments made to any individual by governmental entities, at the state, local, and federal level, for the promotion of general welfare, could be excluded from gross income of the recipient.<sup>188</sup> The GWE exclusion appears to date back to at least 1938 in a ruling by the IRS that Social Security Benefits were not includable in gross income.<sup>189</sup>

In determining whether the GWE applies to such payments, the IRS generally requires that the payments: (1) be made from a governmental general welfare fund; (2) be for the promotion of the general welfare, that is based on need as opposed to a distribution made to all residents without regard to financial status, health, educational background, or employment status; and (3) not be made with respect to services rendered by the recipient.<sup>190</sup>

The GWE has generally been “limited to individuals who receive governmental payments to help them with their individual needs,” such as housing or educational assistance, or assistance in obtaining basic necessities.<sup>191</sup> There are payments that a state or local government makes that do not give rise to gross income in the first instance because the payments only indirectly benefit the re-

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<sup>185</sup> *Id.* § 5.03.

<sup>186</sup> *See, e.g.*, Rev. Rul. 98-19, 1998-1 C.B. 840 (excluding from gross income relocation costs paid by a local jurisdiction to flood victims); Rev. Rul. 74-205, 1974-1 C.B. 21 (excluding from gross income payments from government to aid persons displaced from their homes in seeking housing).

<sup>187</sup> *See* Rev. Rul. 74-205, 1974-1 C.B. 21.

<sup>188</sup> I.R.S. Notice 99-3, 1999-1 C.B. 271 (excluding benefits paid under Temporary Assistance for Needy Families).

<sup>189</sup> Congress specifically overturned the doctrine with respect to unemployment and Social Security benefits. I.T. 3229, 1938-2 C.B. 136 (1938); I.T. 3194, 1938-1 C.B. 114 (1938). Section 85 of the Internal Revenue Code provides that unemployment benefits are fully includable in gross income. I.R.C. § 85(b)–(c) (2018). Section 86 provides that half of Social Security is includable. *Id.* § 86 (a)(1)(A).

<sup>190</sup> *Maines v. Comm’r*, 144 T.C. 123, 138 (2015).

<sup>191</sup> I.R.S. Notice 2003-18, 2003-1 C.B. 699.

ipients, such as public libraries, community recreational facilities, or other community facilities for the general public.<sup>192</sup> Payments to businesses generally do not qualify because they are not based on individual or family needs,<sup>193</sup> and payments in lieu of compensation do not qualify under the GWE.<sup>194</sup>

While the legal foundation for the general welfare exclusion is not entirely clear, the most likely reason for the exclusion is that “Congress simply did not intend to tax this kind of receipt.”<sup>195</sup> From a policy perspective, the GWE aligns with the structure of the federal income tax system, which is a progressive tax system. A progressive income tax system means that a taxpayer’s tax burden increases as the taxpayer’s income rises.<sup>196</sup> A progressive tax system advances the goal of achieving vertical equity, or the concern that the appropriate tax burden should be borne by taxpayers according to their ability to pay.<sup>197</sup> The policies served by the GWE align with the progressive tax system because taxpayers who qualify for general welfare-type benefits generally lack the ability to pay. A taxpayer who qualifies for and receives some types of general welfare benefit does not offend notions of vertical equity, and the result is “fair.”<sup>198</sup> There are other justifications for the exclusion, including the administrative concerns where the general welfare benefit is not a cash payment.<sup>199</sup> Under those circumstances, the recipient may lack sufficient liquidity to pay any tax imposed.<sup>200</sup>

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<sup>192</sup> These types of general public benefits do not give rise to gross income, and the TGWE likewise does not apply to such types of benefits. Rev. Proc. 2014-35, 2014-21 I.R.B. 1110, § 2.04.

<sup>193</sup> *Id.* § 2.02.

<sup>194</sup> *Id.* § 2.03.

<sup>195</sup> THEODORE P. SETO, FEDERAL INCOME TAXATION: CASES, PROBLEMS, AND MATERIALS 53–54 (2d ed. 2015). Professor Seto also notes that there is no legislative history to support this position, but that “it does seem unlikely that Congress intended to subject governmental benefits and services to income taxation.” *Id.* at 54. Professor Seto looks at other similar exclusions, such as Sections 102 and 118 to draw support for the general welfare exclusion by analogy. *Id.* Section 102 excludes gifts from gross income, I.R.C. § 102(a) (2018), and Section 118 excludes governmental and other subsidies from corporate income. *Id.* § 118(a). Regardless of the legal reasons for the exclusion, the general welfare exclusion is hardly a common or hot topic in tax. As Professor Seto states, “the doctrine continues to function in obscurity . . . .” SETO, *supra*, at 55.

<sup>196</sup> JOEL SLEMROD & JON BAKIJA, TAXING OURSELVES: A CITIZEN’S GUIDE TO THE DEBATE OVER TAXES 88 (5th ed. 2017).

<sup>197</sup> *Id.* at 88–89.

<sup>198</sup> To be clear, the federal tax system is not only concerned with vertical equity. *Id.* at 437 n.92. There are other fairness issues involved, and other competing policies such as simplicity and ease of administration. *See id.* at chapter 5 (“Simplicity and Enforceability”).

<sup>199</sup> A taxpayer who is in receipt of any general welfare benefits, in particular those who receive benefits in kind, such as payments made on their behalf for housing, education, or medical care, will most likely lack the cash necessary to pay the tax on the benefit. Enforcement of a tax imposed on such benefits would be very difficult.

<sup>200</sup> Generally, all realized gains must be recognized, *see* I.R.C. § 1001(c) (2018), and the lack of liquidity from a transaction does not prevent the tax consequences. *Cf. Eisner v. Macomber*, 252 U.S. 189, 193–94 (1920). The tax code does permit deferral of tax consequenc-

*D. Comparison of the Canons of Construction in Tax Law Versus Federal Indian Law and Application of Federal Indian Law Canons Under the TGWE*

Because this article seeks to interpret the language of a new federal statute, a tax practitioner or scholar may think it a simple matter of “employ[ing] the usual tools of statutory construction.”<sup>201</sup> The rules for statutory construction of federal tax law are generally no different than those for other types of statutes.<sup>202</sup> If a term is defined by the code, that definition controls.<sup>203</sup> If a term is undefined, it is usually a matter of interpreting the language according to its plain meaning.<sup>204</sup> If the language of the statute is ambiguous or would lead to absurdity, courts may look to external sources, such as legislative history and policy.<sup>205</sup> Provisions of the code are read together with other provisions to devise cohesive and coherent principles.

Indian law issues are not analyzed in the same manner as federal tax statutes.<sup>206</sup> The canons of construction in federal Indian law, sometimes referred to as sympathetic construction, are different in that they provide that ambiguities in the statute are to be resolved in favor of the tribes and that deference shall be given to the tribes.<sup>207</sup> The canons arose out of the need to compensate tribes for the unequal bargaining power they had at the time tribes entered into treaties with the federal government and to help effectuate the federal trust responsibility.<sup>208</sup> In construing treaties, it means interpreting them as they would have been “understood by the tribal representatives” at the time of negotiation.<sup>209</sup>

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es in certain circumstances where public policy so warrants. *See* I.R.C. § 1031(a)(1) (allowing for deferral on exchanges of like kind property); *id.* § 1033(a)(1) (allowing for deferral of recognition on reinvestment of proceeds from involuntary conversions); *id.* § 1041(a)(1)–(2) (requiring non-recognition on transfers between spouses or incident to divorce); *id.* § 721(a) (deferring recognition on transfers of property in exchange for partnership interests).

<sup>201</sup> BITTKER & LOKKEN, *supra* note 150, at ¶ 4.2. n.7 and accompanying text.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* ¶ 4.2. nn.16, 16.3 and accompanying text.

<sup>205</sup> *Id.* ¶ 4.2.

<sup>206</sup> To the contrary, one scholar stated that “[t]he distinguishing feature of Indian tax law . . . is the absence of statutes.” Russel Lawrence Barsh, *Issues in Federal, State, and Tribal Taxation of Reservation Wealth: A Survey and Economic Critique*, 54 WASH. L. REV. 531, 544 (1979) (noting that Indians are not defined under the tax code).

<sup>207</sup> COHEN’S, *supra* note 5, at § 2.02[3]; LUNA-FIREBAUGH, TRIBAL POLICING: ASSERTING SOVEREIGNTY, SEEKING JUSTICE 10 (2007).

<sup>208</sup> CANBY JR., *supra* note 152, at 116 (listing disadvantages to tribes in treaty process such as federal government dictated terms; treaties were written in English; concepts may have been foreign to tribes; and the government may have negotiated with parties other than tribal leaders).

<sup>209</sup> *Id.* at 122.

The canons of construction have been extended to statutes dealing with Indian affairs.<sup>210</sup>

In general, whether the canons of construction for Indian law apply in the federal tax context is somewhat uncertain.<sup>211</sup> However, the uncodified statutory language of the TGWE is clear that the canons of construction of Indian law apply in construing the TGWE and that deference be given to the tribes with respect to their general welfare programs.<sup>212</sup>

## II. ANALYSIS OF THE PROPER INTERPRETATION OF THE LAVISH AND EXTRAVAGANT LIMITATION ON TRIBALLY SOURCED TRANSFERS TO INDIVIDUALS WHO PARTICIPATE IN CULTURAL AND RELIGIOUS CEREMONIAL ACTIVITIES

Because the words “lavish” and “extravagant” are not defined in the TGWE, the IRS and consulted groups have been tasked with promulgating interpretive guidance as to the meaning. As of the writing of this article, no guidance has been issued by the IRS. To help the IRS understand the issue, this analysis examines the meaning of lavish and extravagant in other instances within the tax law itself. Finding the analogies to other areas of the tax law inappropriate and after applying the canons of construction for federal Indian law—as required by the statute—the analysis turns to the question of the purpose and value of the lavish and extravagant limitation and discusses how such a limitation is inconsistent with current federal Indian policy.

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<sup>210</sup> *Montana v. Blackfoot Tribe of Indians*, 471 U.S. 759, 766 (1985) (“[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.”) (internal citations omitted); *Confederated Tribes of the Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996). This principle has been true even when courts have faced two possible constructions. *See* *Cty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992).

<sup>211</sup> *See* ABIGAIL BOUDEWYNS ET AL., *AMERICAN INDIAN LAW DESKBOOK* § 11:11 (2019) (“Notwithstanding the clarification provided in *Chickasaw*, there remains uncertainty over the proper interaction between the Indian canons of construction and determinations of whether tribes or Indians are entitled to an exemption from a generally applicable federal tax.”).

<sup>212</sup> Tribal General Welfare Exclusion Act of 2014, Pub. L. No. 113-168, 128 Stat. 1883, 1884 (2014) (uncodified language) (“Ambiguities in section 139E . . . shall be resolved in favor of Indian tribal governments and deference shall be given to Indian tribal governments for the programs administered and authorized by the tribe to benefit the general welfare of the tribal community.”).

Although the TGWE specifically says the canons of construction for Indian law apply, it is arguably an unnecessary statement. The TGWE implicates federal Indian law and policy, and most likely the canons of Indian law would apply regardless of express statement.

Furthermore, as discussed *supra* at note 157 and accompanying text, the statute provides that the guidelines interpreting lavish and extravagant shall be made in consultation with a Tribal Advisory Committee.

A. *The Meaning of Lavish and Extravagant in Other Parts of the Tax Laws*

To interpret the meaning of lavish and extravagant for purposes of the TGWE, the analysis first demands that the canons of construction for Indian law apply.<sup>213</sup> That is to say, all ambiguities must be resolved in favor of the tribe. With that statutory construction principle in mind, there are two other instances in the tax laws where the same language is used. The first is in the tax code itself that prohibits business deductions for lavish and extravagant travel expenses.<sup>214</sup> The second is in the IRS guidance providing for the GWE for benefits paid by non-tribal governments.<sup>215</sup>

1. *The Express Prohibition on the Deduction for Lavish and Extravagant Travel Expenses Incurred in the Course of a Trade or Business*

Besides the TGWE, the tax code expressly uses the phrase “lavish and extravagant,” only as a limitation to the deductibility of travel expenses and business meals while away from home.<sup>216</sup> Generally, a taxpayer may deduct the “ordinary and necessary” expenses of carrying on a trade or business, including travel expenses.<sup>217</sup> Deductible travel expenses include expenses “for meals and lodging[.]” but the code disallows the deduction for “amounts which are lavish or extravagant.”<sup>218</sup> The code does not define what constitutes lavish or extravagant travel and meal expenses, but the IRS has construed the phrase to be a subjective limitation depending on what would be lavish in the context of the taxpayer’s particular business.<sup>219</sup>

In published guidance, the IRS has articulated that, “[a]n expense is not considered lavish or extravagant if it is reasonable considering the facts and circumstances. Expenses will not be disallowed just because they are more than a fixed dollar amount or take place at deluxe restaurants, hotels, nightclubs, or resorts.”<sup>220</sup> Because travel and meal expenses are inherently connected to the personal needs of human beings, the prohibition on the deduction of “lavish and extravagant” expenditures is obviously intended to curb abuse.<sup>221</sup>

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<sup>213</sup> See *supra* notes 200–2011 and accompanying text.

<sup>214</sup> I.R.C. 162(a)(2) (2018); see also *infra* Section II.A.1.

<sup>215</sup> See *infra* Section II.A.2.

<sup>216</sup> I.R.C. § 162(a)(2); *id.* § 274(k)(1)(A).

<sup>217</sup> *Id.* § 162(a).

<sup>218</sup> *Id.* § 162(a)(2) (travel expenses); *id.* § 274(k)(1)(A) (business meals).

<sup>219</sup> I.R.S. Publication 463, No. 11081L, 12 (Feb. 6, 2015) (“[a]n expense is not considered lavish or extravagant if it is reasonable considering the facts and circumstances.”); see also Rev. Rul. 63-144, 1963-2 C.B. 129 (1963).

<sup>220</sup> I.R.S. Publication 463, *supra* note 219, at 12.

<sup>221</sup> The tax code disallows deductions for “personal, living, or family” expenditures. I.R.C. § 262(a). Treasury regulations provide examples of non-deductible personal expenses, such as costs of housing, “domestic service,” and commuting. Treas. Reg. § 1.262-1(b)(2) (2014) (costs of owning a home), (3) (costs of maintaining a home), and (5) (commuting costs).



The standard for what constitutes lavish and extravagant travel expenses is thus, similar to what is “ordinary and necessary” for a business, subjective in nature, depending on what is reasonable for that particular business.<sup>222</sup> The IRS depends on a natural tension between corporations, which in theory answer to boards of directors and shareholders, and employees who engage in business travel, and who may desire more lavish or extravagant accommodations, to serve as a check on the reasonableness of travel expenditures.<sup>223</sup> The IRS may afford less deference to smaller businesses, especially when the traveler is also the decision maker for the business, such as in sole proprietorships.<sup>224</sup> In any business, big or small, there is a presumed profit motive and any extra or unnecessary spending will reduce potential profits.<sup>225</sup>

The utility of the analogy of the subjective interpretation of lavish and extravagant travel expenses in the context of the TGWE is mixed and depends on the particular tribe. On the one hand, the inherent check on business expenses by shareholders and boards of directors would seem to be absent from distributions from tribes to their members. In other areas, transfers between tribes and members have historically been viewed as suspect by the federal government.<sup>226</sup> However, depending on the structure of a tribe’s leadership, a similar

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The rules are both intended to prevent deduction of extravagant expenditures that have inherently personal nature, such as cruise ships and foreign conventions, I.R.C. § 274(h), and to limit deductions, such as limiting deductions to the face value of entertainment tickets, *id.* § 274 (a)(l); luxury water transportation, *id.* § 274(m); 50 percent of meals and entertainment, *id.* § 274(n); and a limit on the depreciation on luxury cars. *Id.* § 280F.

<sup>222</sup> Although there are no cases interpreting the “lavish and extravagant” limitation; to be deductible, Section 162 also requires the expense to be “ordinary and necessary.” I.R.C. § 162(a). Implicit in the statutory construction of the word “necessary” is a reasonable standard. *See, e.g.,* United States v. Haskel Eng’g & Supply Co., 380 F.2d 786, 788–89 (9th Cir. 1967) (holding an unreasonable amount of an expenditure non-deductible despite the ordinary and necessary nature of the expense); *Comm’r v. Lincoln Elec. Co.*, 176 F.2d 815, 817 (6th Cir. 1949) (“[T]he element of reasonableness is inherent in the phrase ‘ordinary and necessary.’”).

By comparison, other tests for whether an expenditure is deductible as a business expense depend on objective standards. *See, e.g.,* Pevsner v. *Comm’r*, 628 F.2d 467, 470 (5th Cir. 1980) (setting forth objective test for deductibility of clothing).

<sup>223</sup> *See, e.g.,* Palo Alto Town & Country Vill., Inc. v. *Comm’r*, 565 F.2d 1388, 1390–91 (9th Cir. 1977) (reversing Tax Court’s determination that expenditures to maintain private jet were not deductible because there was evidence the expenses were “appropriate and helpful,” and “normal[]” given the taxpayer’s circumstances).

<sup>224</sup> *See, e.g.,* Velez v. *Comm’r*, 115 T.C.M. (CCH) 1201 (2018); *Linzy v. Comm’r*, 219 T.C.M. (RIA) 11–12 (2013); *Bogue v. Comm’r*, 164 T.C.M. (RIA) 10 (2011); *In re Stangeland v. Comm’r*, 185 T.C.M. (RIA) 35–36 (2010).

<sup>225</sup> This may be a naïve understanding as to how business decision makers rationalize spending on deductible expenses. As noted, at *supra* notes 223–25 and accompanying text, the smaller the business and more intimately the owner is connected to the traveling representative, there may exist great potential for abuse in “mixing business with pleasure,” and making decisions with respect to travel that are more luxurious or extravagant than if the expenses were not deductible.

<sup>226</sup> *See infra* Section II.B.2 (discussing legislative history under IGRA for tribes operating casinos and expressing concerns for organized crime).

tension may exist if there is a democratic check on the decisions made by tribal leaders.

2. *The Implied Prohibition on Lavish and Extravagant Benefits in the Context of Non-Tribal GWE*

The non-tribal government GWE doctrine generally prohibits exclusion from gross income of lavish and extravagant benefits and restricts exclusion to those minimal amounts needed to support basic needs.<sup>227</sup> The non-tribal government GWE is not codified in statute, so the limitation has been implied through interpretive guidance. The rulings that set forth exclusions for general welfare imply the limitation. For example, the guidance specifies that payments for housing for displaced people are only available to help acquire modest housing.<sup>228</sup> To be excludable from gross income, government assistance for disaster victims must only be used on necessary medical or housing expenses, to replace personal property, or to cover transportation or funeral expenses, and cannot be for non-essential, luxurious, or decorative items.<sup>229</sup> Similar guidance requires that excludable payments to compensate victims of emergency or disaster situations may only be to cover “unreimbursed [] reasonable and necessary personal, living, and family expenses.”<sup>230</sup> In the context of the welfare benefit exclusion, the language is intended to curb perceived abuse and mistrust of the welfare system.<sup>231</sup>

While it may seem helpful to analogize welfare benefit payments made by governmental entities such as state and local governments, it is far from a perfect analogy. The relationship between the federal government and state and local governments is fundamentally different from the relationship between tribes and the federal government.<sup>232</sup> The federal Constitution is replete with examples of how the federal government has broad governing powers over the

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<sup>227</sup> See *supra* Section I.C.3 n.189 and accompanying text.

<sup>228</sup> Rev. Rul. 74-205, 1974-1 C.B. 21 (qualifying replacement housing must be modest standard).

<sup>229</sup> Rev. Rul. 76-144, 1976-1 C.B. 17 (finding assistance for nonessential, luxurious, or decorative items do not qualify).

<sup>230</sup> I.R.S. Notice 2002-76, 2002-2 C.B. 917 (holding payments for “unreimbursed . . . reasonable and necessary personal, living, and family expenses” incurred in disaster or emergency qualify for exclusion).

<sup>231</sup> The non-tribal governmental general welfare exclusions from gross income also prohibit exclusion if the benefits are lavish and extravagant. See Rev. Rul. 74-205, 1974-1 C.B. 21 (holding replacement housing payments for displaced families excludable if replacement housing is of modest standard); Rev. Rul. 76-144, 1976-1 C.B. 17 (disallowing exclusion of benefits for nonessential, luxurious, or decorative items under disaster victim assistance payments).

<sup>232</sup> The federal government’s relationship with tribes is, as described in the field of Indian law, multi-faceted and complex.

states under the principles of federalism.<sup>233</sup> The federal government's governing authority over tribes is more complicated because the relationships between the federal government and tribal nations originated with treaties between the two, signifying a more lateral, equal relationship.<sup>234</sup> The federal government also is bound by the trust relationship—early Supreme Court jurisprudence characterized tribes as “domestic dependent nations.”<sup>235</sup> It is settled law that a tribe has general governmental power over its territory unless a federal statute or treaty somehow limits the tribe's power.<sup>236</sup> It is therefore appropriate for the federal tax system to place limits on the excludability from gross income of certain payments between state and local governments and individuals where it is not appropriate in the context of payments made by tribes.<sup>237</sup>

Comparing the exclusionary tax doctrines themselves, the scope of the exclusion for Indian tribal government welfare benefits (TGWE) is much broader than for welfare benefits provided by non-tribal governments (GWE) because of the special provision relating to transfers made to support cultural and ceremonial practices.<sup>238</sup> That the TGWE offers support for religious and spiritual practices, in addition to housing, education, medical, and other basic welfare services, is a major distinction.

The usefulness of analogies from other areas of tax law that use the same lavish and extravagant language or similar concepts in the context of the TGWE varies. Because of the enormous distinctions between the relationships

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<sup>233</sup> See, e.g., U.S. CONST. amend. X (powers not delegated to the federal government are reserved for the states); *id.* art. VI, cl. 2 (supremacy clause). Compare *id.* art. I, § 8, cl. 1–18 (enumerated powers of congress), with *id.* art. I, § 8, cl. 3 (Indian commerce clause).

<sup>234</sup> See *supra* at Section I.A.1, for background on the history of treaties between the federal government and tribes. This is different than the states who agreed to the federalist principles by ratifying the U.S. Constitution. Obviously, any notions of equal sovereignty were eroded when the federal government ceased making treaties with Indian Tribes toward the end of the time of removal and creation of reservations, and instead began exercising legislative authority over Indian affairs. See COHEN'S, *supra* note 5, at § 1.03[9]. However, the origin of their relationship recognized mutual sovereignty in government-to-government dealings. *Id.*

<sup>235</sup> *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16–17 (1831). The concept of the trust relationship between the U.S. and tribes was further described as a “ward to his guardian.” *Id.* at 17. Narrowly defined, the trust relationship “approximates that of [a] trustee and beneficiary,” though with various levels of legal enforceability. CANBY JR., *supra* note 152, at 35.

<sup>236</sup> *Montana v. United States*, 450 U.S. 544, 563 (1981).

<sup>237</sup> An argument against this is that the Federal government provides funds to both states and tribes to administer—e.g., Federal government gives funds to states and states administer them, such as Medicare/Medicaid, education, and roads. The BIA gives funds to tribes to manage too. See, e.g., Press Release, Bureau Indian Affairs, Assistant Secretary Tara Sweeney Announces 2019 NABDI Grants Totaling \$727,229 Awarded to 21 American Indian and Alaska Native Tribes (Feb. 5, 2020) (available at <https://www.bia.gov/as-ia/opa/online-press-release/assistant-secretary-tara-sweeney-announces-2019-nabdi-grants-totaling> [https://perma.cc/7S8G-4R4Z]); Bureau of Indian Affairs Federal Grants, FED. GRANTS WIRE, <https://www.federalgrantswire.com/bureau-of-indian-affairs-department-of-the-interior-federal-grants.html#.XISdUShKg2w> [https://perma.cc/6AGL-CSTF] (last visited Feb. 24, 2020).

<sup>238</sup> I.R.C. § 139E(b), (c)(5) (2018).

between tribes and the federal government versus the relationship between the federal government and state and local governments, the analogy to the meaning of lavish and extravagant in the GWE is not helpful. The subjective standard for the meaning of lavish and extravagant in the context of business travel deductions is more useful but still limited. The main limitation is that in analogizing other areas of tax law, the analysis utilizes the canons of construction for tax law, as opposed to the canons of construction for federal Indian law as required by the Tribal General Exclusion Act.

*B. Potential Purposes of the Prohibition on Lavish and Extravagant Benefits*

To properly interpret the meaning of the prohibition of lavish and extravagant distributions, it is important to examine what evils Congress was seeking to combat. Though the legislative history is relatively scant on this point, there are two possible concerns that Congress and/or possibly the Department of Treasury were seeking to address.

*1. Concern About Tribes Masking Taxable Distributions of Gaming Proceeds as Tax-Free General Welfare Payments*

Congress and the IRS seem particularly worried about potential abuse of a tribe distributing so called “per capita payments,” derived from gaming revenues to tribal members.<sup>239</sup> The IGRA permits a tribe to engage in gaming and distribute the revenue equally among its members in “per capita” payments.<sup>240</sup> Per capita distributions of gaming revenues, which are subject to IGRA, constitute gross income and are not excludable under the GWE.<sup>241</sup> A tribe that makes per capita distributions of gaming revenues is subject to federal tax reporting and withholding requirements, and the tribe must notify tribe members of their tax liability.<sup>242</sup> The federal government is concerned that tribes will get more aggressive and plan to disguise gaming revenue per capita payments as general welfare benefits,<sup>243</sup> despite the fact that the TGWE does not speak to the source of funds and that one of the proscribed uses for net gaming revenues is to fund general welfare programs for the tribe.<sup>244</sup> It seems as though it would be per-

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<sup>239</sup> During a legislative hearing leading up to the passage of Section 139E, Senator Tom Udall of New Mexico expressed his concerns: “I am especially concerned that Tribal programs to improve housing conditions, provide training and educational opportunities, and to preserve traditional customs could be viewed as a way to skirt taxation of per capita payments.” *Hearings, supra* note 18, at 3 (statement of Hon. Tom Udall, U.S. Sen. N.M.).

<sup>240</sup> 25 U.S.C. § 2710(b)(1), (b)(3) (2018).

<sup>241</sup> *Id.* § 2710(b)(3); 25 C.F.R. § 290.1–2, 6–8, 10, 12, 20 (2019).

<sup>242</sup> 25 U.S.C. § 2710(b)(3)(D); I.R.C. § 3402(r)(1) (2018).

<sup>243</sup> *See* 25 C.F.R. § 290.1. For further discussion on per capita distributions of gaming revenues and the litigation such payments have engendered, see KATHRYN R.L. RAND & STEVEN ANDREW LIGHT, *INDIAN GAMING LAW AND POLICY* 66–68 (2d Ed. 2014).

<sup>244</sup> 25 U.S.C. § 2710(b)(2)(B). The five purposes for which a tribe may use net gaming revenues are to fund tribal government or operations, provide for general welfare of the tribe,

fectly legal, and tribes could comply with the requirements of the TGWE, to fund welfare distributions from gaming revenues.

Attempting to disguise distribution of gaming proceeds that are taxable on a per capita basis as welfare benefits may appear abusive to the federal government. As long as a tribe complies with the IRS published guidance on the matter, a tribe may in fact structure redistribution of gaming proceeds as general welfare benefits and legally avoid taxation (i.e. making the payment not subject to inclusion in gross income by recipient and not reportable as a payment by tribe).

A recent case out of the Eleventh Circuit addressed the issue of a tribe's attempt to recharacterize per capita distributions as general welfare benefits that would be excludable by the tribal member recipient.<sup>245</sup> In *United States v. Jim*, Sally Jim, an enrolled member of the Miccosukee Indian Tribe, a federally recognized Indian tribe in Florida, sought to refute federal tax assessments on a distribution of \$272,000 she received from her tribe.<sup>246</sup> The tribal member argued that distributions received from the tribe were exempt from tax because they constituted Indian general welfare benefits under Section 139E.<sup>247</sup> The source of the vast majority of the amount the Miccosukee Tribe distributed was from gaming revenues.<sup>248</sup> The district court granted summary judgment in favor of the IRS on the issue that per capita distributions made pursuant to IGRA are subject to federal taxation, but a trial was held on the issue as to how much of the distribution came from tribal gaming sources.<sup>249</sup> At trial, Sally Jim did not present evidence that any portion of the distribution she received from the tribe came from sources other than tribal gaming revenue, and the district court found that her entire distribution was from gaming revenue.<sup>250</sup> On appeal, the Eleventh Circuit considered whether the TGWE amends the mandate in IGRA that per capita distributions are taxable.<sup>251</sup> Holding that the TGWE does not release per capita distributions from taxation, the court emphasized that the language of IGRA was clear on the tax consequences of per capita payments and

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“promote tribal economic development,” support charitable organizations, and to fund operations of local governmental agencies. *Id.*

<sup>245</sup> *United States v. Jim*, 891 F.3d 1242, 1245 (11th Cir. 2018). Related to the case *United States v. Jim*, was a case in which a tribe asserted that distributions were made pursuant to the TGWE, and thus the IRS could not summons information regarding the distributions, which the court found were per capita distributions of gaming revenues. *See United States v. Billie*, 611 F. App'x 608, 611–12 (11th Cir. 2015).

<sup>246</sup> *Jim*, 891 F.3d at 1246–47. The distributions were made to Sally Jim individually, but the total amount was \$68,000 per person, and she received a total amount for her, her husband, and her two children. *Id.* at 1246.

<sup>247</sup> *Id.* at 1247.

<sup>248</sup> *Id.* at 1246. Of the total \$32,268,000 distributed in 2001 by the Miccosukee Indian Tribe, only \$164,319 came from non-gaming sources. *Id.*

<sup>249</sup> *Id.* at 1247–48.

<sup>250</sup> *Id.* at 1248.

<sup>251</sup> *Id.* at 1250.

nothing in the language of the TGWE nor its legislative history indicated an intent to change the tax consequences imposed by IGRA.<sup>252</sup>

## 2. *Veiled Racism and Classism*

A possible reason Congress included the restriction of lavish and extravagant benefits could stem from longstanding distrust of the ability of tribes to govern.<sup>253</sup> Paternalistic at best, and thinly veiled racist and classist at worst, the prevailing attitudes among federal lawmakers is distrust in Indian tribes.<sup>254</sup> These beliefs lead to Congress imposing limitations on the tax exclusion to prevent tribes from engaging in abusive behavior by distributing excessive benefits to those members who participate in cultural and ceremonial activities.

While the concern for abuse of camouflaging taxable per-capita distributions of gaming proceeds through a tax-free general welfare benefit was expressly stated by at least one Congressional leader,<sup>255</sup> there is no direct evidence that Congress harbors racist and classist views of tribal administration of tribal welfare programs. Such evidence is circumstantial and derived from both positions the federal government has taken with respect to other legislation and in litigation against tribes and history itself.<sup>256</sup>

As an example of the federal government's distrust of tribes, in litigation against a federally recognized Indian tribe, the United States argued that a state ought to be able to regulate the transportation of cigarettes by tribal members and tribal businesses despite treaty language granting the tribe the right to travel.<sup>257</sup> The government's argument, in part, was based on concerns for a "slippery slope" where the lack of a state's ability to regulate could lead to the tribe's transportation within the state of "other 'restricted goods,' such as illegal narcotics."<sup>258</sup> Disagreeing with the potential parade of evils highlighted by the federal government, the Ninth Circuit quoted the Yakama Nation's *amicus curiae* brief, which defended the conduct of the tribe, saying:

The Yakama Nation is a sovereign nation, with its own government, laws and courts, not a rogue organization or menace to civil order. The Yakama Nation does not and never has asserted that its members have a right under its treaty to

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<sup>252</sup> *Id.* at 1251.

<sup>253</sup> The establishment of the trust relationship itself established the paternalistic nature of federal-tribal relations.

<sup>254</sup> For example, under IGRA, a tribe may only use net gaming revenues for one of five purposes. 25 U.S.C. § 2710(b)(2)(B) (2018).

<sup>255</sup> See *Hearings*, *supra* note 18, at 5 (statement of Hon. Tom Udall, U.S. Sen. N.M., Committee on Indian Affairs, U.S. Senate).

<sup>256</sup> See Section I.A for the history of federal Indian law and policy.

<sup>257</sup> *United States v. Smiskin*, 487 F.3d 1260, 1262 (9th Cir. 2007).

<sup>258</sup> *Id.* at 1270–71. *Smiskin* involved the construction of a treaty between the federal government and the Yakama Indian Nation and whether the "Right to Travel provision" in the treaty exempted members of the Yakama tribe from state regulations on the transportation of cigarettes. *Id.* at 1262.

traffic in narcotics. For the government of the United States to be suggesting otherwise is irresponsible.

The Yakama Nation must and will intercede as litigant or *amicus* to protect its members' treaty right to travel when the federal government overreaches, as it has here. But the Nation has no interest in promoting, condoning, or protecting activities by its members that pose real dangers to public health, public safety, natural resources, or public infrastructure. The Nation has no such interest not only because irresponsible overreaching on its part would likely prompt Congress to exercise its constitutional/political power to abrogate or limit the treaty right to travel, but also because the Yakama Nation and its members share the interest all citizens have in public health, public safety, conservation and equitable exploitation of natural resources, and adequate public infrastructure.<sup>259</sup>

The language of the Tribal General Welfare Exclusion Act expresses the federal government's desire to defer to and willingness to consult with tribes on creation of policy.<sup>260</sup> Despite these enlightened objectives, the language prohibiting lavish and extravagant benefits of an Indian tribal government program contradicts that deference and emphasizes, at best, a paternalistic or at worst, racist approach to interpreting the TGWE. That approach harkens back to earlier eras of Indian policy, such as when federal policy focused on the assimilation of individual Indian tribal members and, at worst, the elimination of tribes.

*C. The Prohibition Against Lavish and Extravagant Benefits for Tribal Cultural and Religious Traditions is Inconsistent with Current Federal Indian Policies Intended to Promote Tribal Sovereignty and Self-Determination*

Interpreting the prohibition on lavish and extravagant benefits with a subjective standard that varies with each tribe will not ensure that the objectives of the TGWE, specifically to promote tribal culture and ceremonial practices, will be met. The language prohibiting lavish and extravagant transfers is inconsistent with federal Indian policies because it strips tribes of their sovereignty and denies them recognition as religious and cultural sovereigns.

*1. Interpreting the Lavish and Extravagant Language as a Subjective*

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<sup>259</sup> *Id.* at 1271. This same language was quoted by the Supreme Court of Washington State in *Cougar Den, Inc. v. Washington State Department of Licensing*, when the state of Washington dismissed similar arguments about the "parade of horrors" that could result from interpreting a treaty between a tribe and the federal government to provide immunity to the tribe from state tax laws of general applicability. 392 P.3d 1014, 1020 (Wash. 2017). In *Cougar Den*, the state of Washington argued that if the court would allow a tribe to escape state wholesale fuel taxes the consequences would be that tribal members could also avoid prosecution under state laws for possession of firearms by felons. *Id.* at 1019; *see also* Appellant's Opening Brief at 33, *Cougar Den, Inc. v. Washington State Dep't of Licensing*, 392 P.3d 1014 (Wash. 2017) (No. 92289-6).

<sup>260</sup> Tribal General Welfare Exclusion Act of 2014, Pub. L. No. 113-168, 128 Stat. 1883 (creation of Tribal Advisory Committee); I.R.C. § 139E (2018) (stating Indian law canons of construction applies).

*Standard Under the TGWE is not Enough to Promote Tribal Ceremonial and Cultural Practices*

The prohibition on lavish and extravagant travel expenses is a subjective inquiry that depends on the particularized business.<sup>261</sup> Because the application of the canons of construction in Indian law to the federal tax statutory language prohibiting lavish and extravagant benefits requires that the ambiguities in the statute are to be construed in the favor of the tribes and with deference to the tribes, one interpretation could be that the limitation is rendered a judgment of the tribe. If this was the case, a tribe making such a distribution could just meet the standard by proclaiming the benefits not lavish and extravagant under the circumstances. As explained below, however, a subjective standard for tribes to declare what constitutes lavish and extravagant internal to their own tribe does not promote self-determination and sovereignty.

2. *The Existence of the Limitation of Lavish and Extravagant Benefits is, Itself, Inconsistent with Federal Indian Policies in Favor of Self-Determination and Tribal Sovereignty*
  - a. *The Portion of the TGWE to Promote Participation in Ceremonial and Cultural Practices is a Measure to Make Reparations for the Federal Government's Historical Attempts to Eradicate Tribal Religious and Cultural Practices*

In light of the federal government's history of attempting to eliminate tribal culture, language, and religion, it seems particularly appropriate to shield from federal taxation any payments to tribal members by their Indian tribal government pursuant to the tribe's prioritization of language, cultural, or ceremonial retention or development.<sup>262</sup> The history of the federal government's attempts to eradicate tribal culture and religious practices, particularly of the Termination Era, is instructive here. If the federal government limits the distributions made by tribes for ceremonial participation by prohibiting lavish and extravagant transfers, then the federal government is not fully making reparations for the past transgressions, nor is the federal government fully and unconditionally encouraging such practices.

- b. *Indian Tribes are Cultural Sovereigns and Ought to be Entitled to Autonomy to Make Determinations as to What Transfers are Appropriate for Cultural and Ceremonial Practices.*

Indian nations are not just political sovereigns. The Indian Civil Rights Act does not incorporate the Establishment Clause from the federal Bill of

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<sup>261</sup> See *supra* notes 220–21 and accompanying text.

<sup>262</sup> *Affiliated Tribes of Northwest Indians et al., Joint Comments on IRS Notice 2012-75*, 18.



Rights.<sup>263</sup> Tribes function as religious and cultural sovereigns, in addition to political sovereigns. Therefore, any analogies between tribes and state and local governments are of limited value.

The proper view of tribal sovereignty is not just political independence, but also allowing tribes to have complete independence over cultural and religious practices. In the context of the TGWE, a number of tribes have taken the position that they should not be burdened by the concept of tax implications when practicing their traditional practices and cultures, asking for the IRS to “yield its jurisdiction where tribal cultural activities begin.”<sup>264</sup> Furthermore, participation in traditional culture and ceremony “hold deeper meaning to American Indian and Alaska Native peoples than other equally important priorities, because they speak to tribal peoples’ identity as human beings.”<sup>265</sup>

Any limitation by the federal government as to what types of distributions would be taxable or exempt from tax acts as a constraint on the ultimate religious and cultural sovereignty of a tribe. Although the federal government could argue that tribes are still permitted to make distributions that are lavish and extravagant with the recipient being subject to tax, such an argument overlooks the meaning of sovereignty. Tribes, especially in the religious and cultural context, deserve ultimate independence.<sup>266</sup>

*c. The Prohibition on Lavish and Extravagant Benefits Ignores Cultural Differences Between Tribes and Non-Tribal Society*

Tribes, through individual members and as sovereign entities, have a history of engaging in transfers that are not the same as European-type commercial arrangements.<sup>267</sup> For example, tribal governments have historically engaged in “potlatch” culture, that included ceremonial gifting of items of value to ensure equal distribution of assets and ensure survival during times of scarcity.<sup>268</sup>

The inherent problem with the federal government seeking to impose tax consequences on lavish and extravagant transfers between tribes and their members, while exempting modest transfers, is that the federal government assumes European/colonial construct of economic transfers and ignores the cultural context in which the transfers are being made.

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<sup>263</sup> See *supra* note 142 and accompanying text.

<sup>264</sup> Affiliated Tribes of Northwest Indians, *supra* note 262, at 18.

<sup>265</sup> *Id.*

<sup>266</sup> There are statutory safeguards in place to curb potential avenues for abuse, such as distributions of per capita gaming proceeds. See *supra* notes 238–43 and accompanying text.

<sup>267</sup> See Ann M. Carlos & Frank D. Lewis, *Native Americans, Exchange, and the Role of Gift-Giving*, in UNLOCKING THE WEALTH OF INDIAN NATIONS 39 (Terry L. Anderson ed., 2016). The literature on economic transfers and market trade among Indians is well established and shows values of reciprocity and redistribution.

<sup>268</sup> *Id.* at 49.

Studies on American Indian trade and economies have been resoundingly criticized for lacking cultural understanding and cultural construct.<sup>269</sup> While some scholarly ethnographic studies on American Indian trade have attempted to “identify cultural constructs that informed the conduct of economic activity,” much of the work focused on normative information and not addressing “the wider political economic contexts of reciprocity and redistribution.”<sup>270</sup>

Studies on the religious practices of American Indian tribes have likewise been criticized as failing to “adequately represent the complexity of native religious life.”<sup>271</sup> This failure is in part because of “cross-cultural translation,” and because of “the denial of the legitimacy of native peoples to practice native religions.”<sup>272</sup>

Failures from an ethnographical or anthropological perspective to fully understand and appreciate both the economic transfers and the spiritual practices of American Indian tribes support the argument that the federal government, with its European notions of economic transfers, should not impose standards regarding the transfers between tribes and their members, especially in the context of tribal cultural practices.<sup>273</sup>

#### CONCLUSION

The TGWE, a new federal tax statute that allows tribal members an exclusion from gross income for Indian general welfare benefits, including payments made for participation in “cultural or ceremonial activities for the transmission of tribal culture,” serves as social policy to promote and encourage tribal religious and cultural expression. The TGWE is intended to ameliorate a history of aggressive and unfair tax enforcement issues in Indian Country and to promote, in part, participation in tribal cultural and ceremonial practices. However, the statutory language that states excludable welfare benefits cannot be “lavish and

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<sup>269</sup> Patricia Albers, *Labor and Exchange in American Indian History*, in A COMPANION TO AMERICAN INDIAN HISTORY 278 (Philip J. Deloria & Neal Salisbury eds., 2002) (“Although some neoclassical economists and evolutionary ecologists continue to explain American Indian labor and exchange through an essentialist discourse, most historians and ethnographers of the fur trade have weighed in against this mode of interpretation. The debates over the economic ‘rationality’ of American Indian conduct in indigenous and fur trade contexts are not likely to be resolved until there are more refined analyses of the linguistic and cultural constructs within which the fur trade and native economic activity more generally were situated.”).

<sup>270</sup> *Id.* at 272.

<sup>271</sup> Lee Irwin, *Native American Spirituality: History, Theory, and Reformulation*, in A COMPANION TO AMERICAN INDIAN HISTORY 104 (Philip J. Deloria & Neal Salisbury eds., 2002).

<sup>272</sup> *Id.*

<sup>273</sup> *Hearings*, *supra* note 18, at 54 (Statement of William Lomax, President of NAFOA) (“[T]he IRS is making these determinations case-by-case, without integrating Federal Indian policy into their decisions. This has the effect of placing Tribal well-being, culture, and values in the hands of field agencies who routinely make these determinations, instead of duly elected Tribal leaders, Congress, and the Administration.”).

extravagant” is inconsistent with the statute’s purposes. The prohibition of lavish and extravagant transfers is also inconsistent with federal Indian policies of promoting self-determination and tribal sovereignty. As such, the prohibition of lavish and extravagant transfers should be removed from the statutory language or ignored completely in enforcement as it is an untenable standard.