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# PREVIEW—Lac Courte Orielles Band of Lake Superior Chippewa v. Evers: Just How Special Is Indian Law?

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# PREVIEW—Lac Courte Orielles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers: *Just How Special is Indian Law?*

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The United States Court of Appeals for the Seventh Circuit will hear oral arguments on Monday, November 8, 2021, at 9:30 a.m. at the Everett McKinley Dirksen Courthouse in Chicago, Illinois. Vanya S. Hogen will likely argue for the Appellants, four bands of the Lake Superior Chippewa tribes, and Wisconsin Attorney General Joshua L. Kaul will likely argue for the Appellee, State of Wisconsin and Wisconsin towns.

## I. INTRODUCTION

This case[1] tests a long-standing historical tension in Indian law: How faithfully should the courts apply the special Indian canons of construction when they conflict with principles of common law?[2] The canons, established long ago by the Supreme Court as bedrock notions of federal common law, supersede normal rules of statutory construction.[3] The primary canon, for example, instructs courts to read Indian treaties as their tribal signatories would have understood them.[4] This case asks whether a basic real property notion—that taxability runs with ownership in fee—ought to stand as practically its own canon, effectively reversing the Indian canon deference formula. Recent precedent suggests yes.[5] Or, should the courts more strictly apply the canons analysis and consider the issue in terms of treaty rights, clear Congressional intent, and give deference to the Indians?

Four bands of Lake Superior Chippewa tribes in northern Wisconsin (the "Tribes") brought this action in the U.S. District Court for the District of Wisconsin seeking declaratory and injunctive relief against

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1. Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers, 18-CV-992-JDP, __F.Supp.3d__, 2021 WL 1341819 (W.D. Wis. Apr. 9, 2021)

2. For a brief overview of the Indian canons, *see* NELL JESSUP NEWTON ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (2019). In depth discussion of the canons and their relationship to constitutional law can be found at *Indian Canon Originalism*, 126 HARV. L. REV. 1100 (2013).

3. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

4. *Worcester*, 31 U.S. (6 Pet.) at 582.

5. *E.g.*, Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 110–11 (1998); County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 262 (1992).

the State of Wisconsin.[6] Appealing now to the Court of Appeals for the Seventh Circuit, the Tribes contend that the State cannot impose ad valorem property taxes[7] on former allotted land on the reservation held in fee simple by their members.[8] The Tribes say that treaty rights guarantee them a "permanent home" immune from taxation and that Congress never abrogated that treaty right[9] as would be required by the Indian canons.[10] The State, for its part, argues that the alienation principle should control as a matter of settled law: Alienation abrogates treaty rights and allows states to tax Indian lands as soon as they pass into non-member hands.[11] Wisconsin, therefore may tax tribal lands held at any time by non-Indians.[12]

## II. FACTUAL AND PROCEDURAL BACKGROUND

The conflict here implicates nearly 200 years of tribal–U.S. relations, with the determinative era running from early treaty-making in the 1840s[13] to the Indian Reorganization Act ("IRA") and the end of allotment in the 1930s.[14] No party disputes the facts of the case.[15]

After a series of treaties resulted in forced removal and loss of land for the Tribes, the Tribes signed a treaty with the U.S. in 1854 (the "Treaty") granting them a "permanent home" on new reservations near Lac De Flambeau and Lac Courte Orielle in Wisconsin.[16] There is no evidence that the Tribes either owned land in fee simple or understood fee ownership or taxation of land at the time.[17] There is evidence, however, that they expected they would not lose control of the land on the new

6. Brief of Plaintiffs-Appellants at 1, *Lac Courte Orielles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers*, No. 21-1817 (7th Cir. July 8, 2021), ECF No. 21.

7. Ad valorem taxes are assessed proportional to the value of the thing being taxed, in this case property values. *See* 71 AM. JUR. 2d State and Local Taxation § 81 (Westlaw through 2021).

8. Brief of Plaintiffs-Appellants at 19–20, *Lac Courte*, No. 21-1817.

9. Brief of Plaintiffs-Appellants at 21, *Lac Courte*, No. 21-1817.

10. *Id.*

11. *See* Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 110–11 (1998); County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 262 (1992).

12. Response Brief of Defendants-Appellees at 14–15, *Lac Courte Orielles Band of Lake Superior Chippewa Indians of Wisconsin. v. Evers*, No. 21-1817 (7th Cir. Aug. 27, 2021), ECF No. 36.

13. *E.g.*, Treaty with the Chippewa, 1842, Chippewa-U.S., Oct. 4, 1842, 7 Stat. 591; Treaty with the Chippewa, 1854, Chippewa-U.S., Sept. 30, 1854, 10 Stat. 1109.

14. Indian Reorganization Act of 1934, 25 U.S.C. § 5101–5105 (2018).

15. Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. Evers, 18-CV-992-JDP, __F.Supp.3d__, 2021 WL 1341819, *1 (W.D. Wis. Apr. 9, 2021)

16. Treaty with the Chippewa, 1854 Art. 3, *supra* note 13, at 1110.

17. Brief of Plaintiffs-Appellants at 11–12, *Lac Courte Orielles Band of Lake Superior Chippewa Indians of Wisconsin. v. Evers*, No. 21-1817 (7th Cir. July 8, 2021), ECF No. 21.

reservation under any circumstances.[18] Indeed, they ceded their former territory for pennies an acre to secure that right.[19] The Tribes contended below, and the lower court agreed, that the "permanent home" provision implied immunity from taxation.[20]

Also central to this case is the fact that the Treaty allowed the President to allot 80-acre parcels to individual tribal members in fee simple,[21] which the Executive later did at the behest of the Tribes themselves. They had depended on the sale of timber from their lands, title to which was held in trust by the federal government prior to allotment. But in 1873, the Supreme Court in *United States v. Cook*[22] declared timber a part of the ground real estate, meaning the Tribes had no title to it. Around the same time, annuity payments that the Tribes had negotiated under treaty ended, and the federal government prevented them from hunting, fishing, or gathering off-reservation.[23] Facing starvation, the Tribes lobbied the President to allot their lands so they could harvest timber again.[24]

Nothing in the Treaty allotment provisions, though, addresses state jurisdiction.[25] This stands in contrast to the General Allotment Act ("GAA"), sweeping legislation passed in 1887, which applied across Indian Country and granted allottees citizenship and all its "rights, privileges, and immunities."[26] After passage of that Act, the Executive determined that the Tribes' lands did not fit the criteria for GAA land and allotted them by Executive Order instead, placing those parcels beyond the ambit of the GAA.[27] In 1905, Congress through the Burke Act amended the GAA, subjecting every allottee who receives a patent in fee "to the laws, both civil and criminal, of the State or Territory in which they may reside."[28]

Following guidance by the Wisconsin Department of Revenue, the State chose to tax both post-GAA allotments and those which were allotted pre-GAA under the Treaty, but had since had at least one non-Indian owner.[29] The Tribes paid the taxes in protest and sued for

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18. *Id.* at 10–12.
19. *Id.* at. 21.
20. *Lac Courte*, 2021 WL at *7.
21. Treaty with the Chippewa, 1854 Art. 3, *supra* note 13, at 1110.
22. 86 U.S. 591 (1873).
23. Brief of Plaintiff-Appellants at 13, *Lac Courte*, No. 21-1817.
24. Brief of Plaintiffs-Appellants at 12–13, *Lac Courte Orielles Band of Lake Superior Chippewa Indians of Wisconsin. v. Evers*, No. 21-1817 (7th Cir. July 8, 2021), ECF No. 21.
25. *Id*.
26. General Allotment Act, Pub. L. No. 49-105, § 6, 24 Stat. 388 (1887).
27. Brief of Plaintiffs-Appellants at 16, *Lac Courte*, No. 21-1817.
28. Burke Act, Pub. L. No. 59-149, 34 Stat. 182 (1906).
29. Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers, 18-CV-992-JDP, __F.Supp.3d__, 2021 WL 1341819, *3 (W.D. Wis. Apr. 9, 2021).

declaratory and injunctive relief.[30] Since none of the material facts are in dispute,[31] both parties made cross-motions for summary judgment.[32]

The district court agreed with the Tribes that the Treaty's "permanent home" provision exempted their lands from state taxation, and that the GAA never applied to them.[33] Finding no other clear example of legislative intent by Congress to tax those lands, the court also agreed the Tribes' lands provisionally remained immune to taxation, so long as they had always remained in Indian hands.[34]

However, the court could not ignore the common law principle that "taxability ordinarily flows from alienability."[35] In a string of cases stating the grammatical reverse of the Indian canon formula—favoring tribes absent congressional action to the contrary—the Supreme Court has said alienated lands are presumptively taxable, unless Congress clearly states otherwise,[36] because it would be "strange" for Congress to make Indian land alienable but not taxable.[37] The district court followed this line of Supreme Court cases, holding that non-Indian ownership "severs the tie between land and treaty" and that only the Tribes' fee land which had never passed into non-Indian hands remained immune.[38] The Tribes appeal that holding to the Seventh Circuit.

## III. SUMMARY OF ARGUMENTS

Consistent with its minimalist view of the Indian canons, the State argues its case on appeal as a matter of settled precedent.[39] The Tribes, meanwhile, insist that the law as applied must defer to the canons, which demand a fact-specific inquiry.[40] Regardless of paradigm, both hinge on the ultimate applicability of *Cass County* and the question of whether non-Indian ownership of fee lands on the reservation vanquishes treaty rights.[41]

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30. *Id.*
31. *Id.* at *2.
32. *Id*. at *12.
33. *Id.* at *10.
34. *Id.*
35. Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 104 (1998).
36. *See id*. at 103; County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251 (1992); Goudy v. Meath, 203 U.S. 146 (1906).
37. *Goudy*, 203 U.S. at 149.
38. Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. Evers, 18-CV-992-JDP, __F.Supp.3d__, 2021 WL 1341819, *11–12 (W.D. Wis. Apr. 9, 2021) (citing *Cass County*, 524 U.S. 103 (1998)).
39. Response Brief of Defendants-Appellees at 19, *Lac Courte Orielles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers*, No. 21-1817 (7th Cir. Aug. 27, 2021), ECF No. 36.
40. Brief of Plaintiffs-Appellants at 22–23, *Lac Courte Orielles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers*, No. 21-1817 (7th Cir. July 8, 2021), ECF No. 21.
41. *Lac Courte*, 2021 WL at *1.

### *A. Appellants' Argument*

Asserting that the Indian canons control the analysis,[42] the Tribes argue that (1) the 1854 Treaty precludes taxation of Indian-owned land on the reservation; (2) prior non-Indian ownership has no bearing on the taxability of current Indian lands; and 3) only Congress can authorize state taxation of Indian land, but in this case never did.

#### *1. The Treaty as Barrier to Taxation*

First, the Tribes say that the Treaty, properly interpreted, creates a right to a "permanent home" which would be unlawfully threatened by the possibility of forfeiture associated with state taxes.[43] When looking to treaty rights, the Indian canons require courts to interpret provisions "as the Indians themselves would have understood them."[44] Here, though the lower court was "skeptical of attempts to ascribe specific knowledge or intent to the Indians,"[45] the Tribes introduced substantial evidence showing both the original Indian signatories and the American negotiators intended for the Tribes to hold their land "as long as there is one Indian left."[46] For example, in the year leading up to negotiation of the Treaty, Indian Agent Henry Gilbert wrote that removal was "the great terror of their lives."[47] They would sooner face "extermination than . . . comply with it."[48]

Since the original signatories contemplated neither alienation nor taxation, the Tribes argue they could not have considered that one would lead to the other.[49] And because the Indian canons require treaty provisions be interpreted liberally in favor of the Indians,[50] proper reading leaves no room for even preliminary application of *Cass County*.[51] Taxation would eviscerate the core treaty promise of a permanent home.[52]

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42. Brief of Plaintiffs-Appellants at 19, *Lac Courte*, No. 21-1817.

43. *Id.* at 21; Reply Brief of Plaintiffs-Appellants at 4–5, *Lac Courte Orielles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers*, No. 21-1817 (7th Cir. Sept. 24, 2021), ECF No. 51. Forfeiture would occur if a tribal member owning land in fee fell behind on their state property taxes and the state decided to foreclose.

44. *Id.* at 23 (quoting Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999)).

45. Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. Evers, 18-CV-992-JDP, __F.Supp.3d__, 2021 WL 1341819, *5 (W.D. Wis. Apr. 9, 2021)

46. Brief of Plaintiff-Appellants at 24–28, *Lac Courte*, No. 21-1817; Reply Brief of Plaintiff-Appellants at 8–13, *Lac Courte*, No. 21-1817.

47. *Id*. at 26.

48. *Id.* at 26–27.

49. *Id.* at 29.

50. *Worcester*, 31 U.S. at 582; Winters v. United States, 207 U.S. 564, 576 (1908).

51. Brief of Plaintiffs-Appellants at 22, *Lac Courte*, No. 21-1817.

52. Brief of Plaintiffs-Appellants at 28, *Lac Courte Orielles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers*, No. 21-1817 (7th Cir. July 8, 2021), ECF No. 21.

*2. Whether Alienability Abrogates the Treaty Right*

The district court agreed with the Tribes' view that the Treaty granted them state property tax immunity,[53] but disagreed that the immunity could survive once land was allotted and sold to non-members.[54] The court below apparently considered the possibility that the Treaty could prevent application of the holding in *Cass County*, but concluded it would be "a stretch" to think the original Indian signatories had no idea non-Indian acquisition of tribal lands would "compromise the permanency" found in the Treaty.[55]

The Tribes contend, however, that signatories on *both* sides believed the Tribes would retain their rights regardless of whether "parcels of . . . land might be acquired by non-Indians from time to time."[56] For instance, Indian Commissioner Manypenny told the Tribes as long as they were "satisfied for [the White Man] to stay he might, but the moment you wish him to go he would go."[57] In effect, the State and lower court's view would allow single tribal members to permanently extinguish the treaty rights of the entire tribe, solely by transferring parcels of land.[58] This, the Tribes say, is particularly egregious because parcels were sometimes transferred involuntarily, such as by foreclosure, or by virtue of intestate succession to non-member family.[59]

The State relies on *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*[60] and *Montana v. United States*[61] for its position that alienation of allotment land is "necessarily a surrender of the tax exemption attached" because tribal authority to exclude is lost when access to land is granted to non-members. [62] The State then cites *Cass County* for the explicit principle that tribal repurchase of alienated land cannot restore treaty protection.[63] In opposition, the Tribes here argue that

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53. Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. Evers, 18-CV-992-JDP, __F.Supp.3d__, 2021 WL 1341819, *7 (W.D. Wis. Apr. 9, 2021).

54. *Id.* at *11.

55. *Id.*

56. Reply Brief of Plaintiffs-Appellants at 12–14, *Lac Courte Orielles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers*, No. 21-1817 (7th Cir. Sept. 24, 2021), ECF No. 51; *accord*. Brief of Plaintiff-Appellants at 29, *Lac Courte*, No. 21-1817.

57. *Id.*

58. Reply Brief of Plaintiffs-Appellants at 15, *Lac Courte*, No. 21-1817.

59. *Id.* at 14.

60. 492 U.S. 408 (1989).

61. 450 U.S. 544 (1981).

62. Response Brief of Defendants-Appellees at 22, *Lac Courte Orielles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers*, No. 21-1817 (7th Cir. Aug. 27, 2021), ECF No. 36 (quoting *Brendale*, 492 U.S. at 424).

63. *Id.* at 25–26 (citing Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 114 (1998)).

none of the three cases apply.[64] *Montana* and *Brendale*, they say, were decisions about the scope of tribal jurisdiction over non-Indians on non-Indian fee land, which is quite limited.[65] *Cass County*, the Tribes argue, was an instance of congressional authorization to tax, as opposed to Executive action[66]—a crucial distinction covered in detail below .

The State points out that the Tribes' theory would prevent states from taxing even reservation fee land owned by non-Indians,[67] an ability neither party questions,[68] but the Tribes say such thinking is "an enormous leap."[69] The Tribes instead suggest that the signatories only negotiated rights for Indians themselves.[70] Where allotted land passes to non-Indians, its non-Indian owners never possessed treaty rights in the first place, so remain subject to state taxation.[71]

*3. Whether Congress alone can authorize state taxation*

Regardless of the persistence of applicable treaty rights, the Tribes assert that their lands remain categorically tax-exempt[72] until Congress authorizes taxation in an "unmistakably clear" way.[73] They say it has not.[74] Distinguishing *Cass County*, the Tribes suggest that Congress, and only Congress, may grant state taxing authority.[75] That case dealt with lands allotted under the General Allotment Act where explicit language made

64. Reply Brief of Plaintiffs-Appellants at 15, *Lac Courte*, No. 21-1817.

65. *Id.*

66. *Id.* at 15–16.

67. Response Brief of Defendants-Appellees at 23–24, *Lac Courte*, No. 21-1817.

68. Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. Evers, 18-CV-992-JDP, __F.Supp.3d__, 2021 WL 1341819, *10 (W.D. Wis. Apr. 9, 2021)

69. Reply Brief of Plaintiffs-Appellants at 16, *Lac Courte Orielles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers*, No. 21-1817 (7th Cir. Sept. 24, 2021), ECF No. 51.

70. *Id.*

71. *Id.* at 15–16.

72. Brief of Plaintiffs-Appellants at 31, *Lac Courte Orielles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers*, No. 21-1817 (7th Cir. July 8, 2021), ECF No. 21 (citing Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458–59 (1995)).

73. *Id.* (quoting Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 765 (1985)).

74. *Id.* at 40.

75. *Id.* at 37–38; Reply Brief of Plaintiffs-Appellants at 19–20, *Lac Courte Orielles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers*, No. 21-1817 (7th Cir. Sept. 24, 2021), ECF No. 51.

the lands taxable.[76] In this case, the Tribes' lands were allotted by Executive Order under the terms of the Treaty.[77]

The Court in *Cass County* makes the broad assertion that "when Congress makes reservation lands freely alienable, it is unmistakably clear that Congress intends that land to be taxable,"[78] but the Tribes say only Congress itself can do that, due to its unique plenary powers over Indians.[79] Indeed, there is evidence that the United States government represented its power as such to the Tribes, who reported Agent Gilbert as saying "there is no one who can invalidate our transactions, even [ the President]."[80]

The district court thought the distinction between Congress and the Executive was negligible, since "all agree" that transfer to non-Indian ownership makes the property taxable by the State.[81] But the Tribes insist the distinction consistently matters in state-tribal tax cases.[82] Where other types of tax are at issue, such as those on goods or personal property on the reservation, courts look only to *congressional* authorization.[83] They have never required tribal members to "prove that the motor vehicle, gasoline, cigarette, or real property they are purchasing or using has always been in the hands of Indians" in order to be exempt.[84]

In sum, the Tribes believe that the State's "matter of law" approach in applying *Cass County* is wrong because: (1) a proper Indian canon analysis of the 1854 Treaty means alienability alone cannot extinguish its rights, making *Cass County* inapplicable; and (2) if one were to apply *Cass County*, only *congressional* enactment of allotment is sufficient to imbue taxation,[85] and Congress had no part in allotment of the Tribes' lands.[86]

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76. Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 106–108 (1998).

77. Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. Evers, 18-CV-992-JDP, __F.Supp.3d__, 2021 WL 1341819, *1 (W.D. Wis. Apr. 9, 2021).

78. 524 U.S. at 104.

79. Reply Brief of Plaintiffs-Appellants at 22, *Lac Courte*, No. 21-1817.

80. *Id.* at 11.

81. *Lac Courte*, 2021 WL 1341819 at *11–12.

82. Brief of Plaintiffs-Appellants at 39–40, *Lac Courte Orielles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers*, No. 21-1817 (7th Cir. Aug. 27, 2021), ECF No. 36; Reply Brief of Plaintiffs-Appellants at 22–23, *Lac Courte Orielles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers*, No. 21-1817 (7th Cir. Sept. 24, 2021), ECF No. 51.

83. Brief of Plaintiff-Appellants at 39, *Lac Courte*, No. 21-1817; Reply Brief of Plaintiffs-Appellants at 23–24, *Lac Courte,* No. 21-1817.

84. *Id.* at 40.

85. *Id.* at 37–38.

86. Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. Evers, 18-CV-992-JDP, __F.Supp.3d__, 2021 WL 1341819, *11 (W.D. Wis. Apr. 9, 2021).

### *B. Appellees' Argument*

The State asserts that the Indian canons cannot overcome the clear precedent set by *Cass County* and its forebears.[87] It argues that (1) as a matter of law, tribal lands become taxable as soon as they pass into non-Indian hands, regardless of subsequent Indian re-acquisition; and (2) the Indian canons do not override the rule that alienation imbues taxation.

#### *1. The status of treaty rights post-alienation*

While the State accepts the general categorical rule that states cannot tax Indians in Indian country without clear congressional authorization, it views land as a special case.[88] Relying on *Montana* and *Brendale*, the State argues that rights "with respect to reservation lands must be read in light of . . . subsequent alienation."[89] Since alienation necessarily transfers the right of exclusive use and possession, as soon as fee land on the reservation passes into nonmember hands, that aspect of applicable treaty rights ceases to have force.[90]

The State considers the context in which the Treaty was signed, and any evidence of its signatories' intent, to be mere "historical matters of fact."[91] Even taking the Tribes' historical evidence as fact, the State says[92] that alienated land remains taxable as a matter of law. Arguing that treaty rights as they relate to land are predicated on a tribe's exclusive use and occupation,[93] the State asserts, quoting *Brendale*, that tribal tax immunity is "necessarily overcome by an 'implic[it] grant' of access to the land."[94] This position departs markedly from the Tribes', which argues that the only limiting factor on treaty rights is necessarily the will of Congress.[95]

Given that treaty rights must be read "in light of the subsequent alienation of those lands,"[96] the State concludes that alienation to non-

87. Response Brief of Defendants-Appellees at 18, *Lac Courte Orielles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers*, No. 21-1817 (7th Cir. Aug. 27, 2021), ECF No. 36.

88. *Id.*

89. Response Brief of Defendants-Appellees at 21, *Lac Courte*, No. 21-1817 (quoting Montana v. United States, 450 U.S. 544, 561 (1981)).

90. *Id.* at 22–23.

91. Response Brief of Defendants-Appellees at 20, *Lac Courte Orielles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers*, No. 21-1817 (7th Cir. Aug. 27, 2021), ECF No. 36.

92. *Id.*

93. *Id.* at 22.

94. *Id.* at 22 (quoting Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408, 424 (1989)).

95. Brief of Plaintiffs-Appellants at 21–22, *Lac Courte Orielles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers*, No. 21-1817 (7th Cir. July 8, 2021), ECF No. 21.

96. Response Brief of Defendants-Appellees at 23, *Lac Courte*, No. 21-1817 (quoting Montana v. U.S., 450 U.S. 544, 561 (1981)).

Indians removes tribal land from federal protection,[97] subjecting it to latent state jurisdiction, which does not end at the reservation's border.[98] Were that not so, on-reservation fee land owned by nonmembers still would remain tax free under the Treaty; yet even the Tribes admit that land *is* taxable.[99]

Reflecting the difficulty of reconciling the Indian canons with common law property principles,[100] the State's argument neatly mirrors the Tribes': Whereas the Tribes believe the canons-as-applied put up a wall preventing the usual transformation of rights by alienation, the State argues alienation itself precludes application of the canons, and thus the factual treaty analysis is unnecessary and inapplicable.[101]

But what if non-Indian fee lands are re-purchased by tribal members? Would that bring them back under federal protection *vis-à-vis* the Treaty? The State argues, categorically, no.[102] *Cass County* plainly rejected that assertion, after it had been reached by the Eighth Circuit.[103] Instead, tribally-owned lands held at one time by non-members would need to be placed back into federal ownership in trust.[104]

In rebuttal to the Tribes' argument that Presidential allotment of tribal lands distinguishes *Cass County* from this case, the State argues *Cass County* applies to all alienated land in Indian Country, regardless of the source of allotment.[105] The State explains that references to Congress's intent in *Cass County* merely reflect "the historical facts of that case."[106] Though the facts there did not require the Court to pass judgment on treaty-allotted lands, it in no way limited its holding to particular modes of allotment.[107]

Along these lines, the State is quick to point out that other broad Indian legislation supports its reading of Congress's intent over time with regard to alienability and its effects on treaty protections.[108] It notes, as the opinion in *Cass County* did,[109] that "dormant" tax immunity on allotted lands would "render superfluous" provisions of the IRA, the major piece

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97. *Id.* at 22.

98. *Id.* at 26–27.

99. *Id.* at 23–24. *See also Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers*, 18-CV-992-JDP, __F.Supp.3d__, 2021 WL 1341819, *5 (W.D. Wis. Apr. 9, 2021).

100. *See* NEWTON ET AL., *supra* note 1, § 2.02[3].

101. Response Brief of Defendants-Appellees at 24–25, *Lac Courte Orielles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers*, No. 21-1817 (7th Cir. Aug. 27, 2021), ECF No. 36.

102. *Id.* at 25.

103. *Id.* at 23–24 (citing Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 113–14 (1998)).

104. *Id.* at 26 (citing *Cass County*, 524 U.S. at 114–15).

105. *Id.* at 26–27.

106. *Id.* at 26.

107. Response Brief of Defendants-Appellees at 27, *Lac Courte Orielles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers*, No. 21-1817 (7th Cir. Aug. 27, 2021), ECF No. 36.

108. *Id.* at 31–32.

109. 524 U.S. at 114.

of federal Indian legislation that officially ended allotment.[110] Those provisions explicitly grant tribal fee lands federal protection from state taxation if the Secretary of Interior brings them back into the federal trust on behalf of the tribes.[111] The State says this is further proof that Congress always intended alienation of fee lands to end treaty protection.[112]

### *2. Whether the Indian canons separately prevent taxation of re-acquired Indian allotment land*

To answer the question of whether former non-Indian fee land on the reservation regains tax immunity when acquired by Indians, the State applies the balancing test from *White Mountain Apache v. Bracker*,[113] which declares that states may tax property on the reservation owned by non-Indians unless the tax is pre-empted by federal law or infringes on the rights of tribes to "make their own laws and be governed by them."[114] Whereas the Tribes would place such property beyond the ambit of treaty rights in the first place,[115] and keeping the categorical approach for reacquired Indian land,[116] the State would limit the categorical rule to instances where reservation land has never passed into non-Indian hands.[117]

Since the State takes a broad reading of *Cass County*, assuming that alienability automatically erases treaty tax protection, it does not consider it necessary to look at the source of allotment,[118] as one might when applying the Indian canons in search of congressional intent under the categorical rule.[119] Indeed, under the State's theory, the question of whether "Congress" in *Cass* County should be read broadly or narrowly no longer matters.

Curiously, the Sixth Circuit in *Keweenaw Bay Indian Community v. Naftaly*,[120] which the district court followed in considering whether the

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110. Response Brief of Defendants-Appellees at 31, *Lac Courte*, No. 21-1817.

111. Indian Reorganization Act of 1934, 25 U.S.C. § 5104 (2018).

112. Response Brief of Defendants-Appellees at 32, *Lac Courte*, No. 21-1817.

113. Response Brief of Defendants-Appellees at 29, *Lac Courte Orielles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers*, No. 21-1817 (7th Cir. Aug. 27, 2021), ECF No. 36 (citing 448 U.S. 136, 143 (1980)).

114. *Bracker*, 448 U.S. at 143 (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)).

115. Reply Brief of Plaintiffs-Appellants at 16–17, 21–22, *Lac Courte Orielles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers*, No. 21-1817 (7th Cir. Sept. 24, 2021), ECF No. 51.

116. *Id.* at 19.

117. Response Brief of Defendants-Appellees at 29–30, *Lac Courte*, No. 21-1817.

118. *Id.* at 30.

119. Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995).

120. 452 F.3d 514 (6th Cir. 2006).

Tribes retained tax immunity for fee lands under continuous Indian ownership,[121] *did* address the meaning of "Congress" issue from *Cass County*. That court concluded that only Congress, and not the Executive, could revoke tax immunity through allotment.[122] The district court, though, went the other way, deciding that alienation makes tribal land taxable where Congress does not.[123]

Since the State broadly applies the rule in *Cass County*, it cements its argument by pointing to practical and conflict-of-laws concerns.[124] Noting that a "statute should not be construed in a way that would make any part of it superfluous, void, or insignificant,"[125] the State argues that tying taxability of Indian land to its location and identity of its owner would render the statutory process for returning Indian land back to federal trust "partially superfluous."[126]

In addition, the State says that Congress required the Secretary of the Interior to carefully consider "jurisdictional problems and potential conflicts of land use" inherent in tribes expanding their sovereignty, because that process is fraught with complexities.[127] Allowing tribal land to automatically regain tax immunity when title is re-acquired by members would allow tribes to circumvent Congress's concerns and will.[128] The State urges the court here to avoid such practical and interpretive quagmires.[129]

Underscoring the conflicts that arise when the Indian canons intersect with other areas of common law, the State makes a strong preference for rules-based precedent, rather than the historically fact-intensive approach favored by the Tribes. It ultimately argues in that vein that the Tribes cannot escape settled black letter law by invoking the Indian canons. The 1854 Treaty, the State contends, permanently lost its force as soon non-Indians acquired fee lands, regardless of how it was allotted, and no special interpretation of settled precedent (such as *Cass County*) can change that fact.

## IV. ANALYSIS

In a narrow sense, the issue in *Lac Courte Orielle* focuses on a discrete, straightforward question: Do fee lands on a reservation, allotted by treaty, maintain their tax-free status so long as a member of the tribe

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121. Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers, 18-CV-992-JDP, __F.Supp.3d__, 2021 WL 1341819, *10 (W.D. Wis. Apr. 9, 2021).

122. *Naftaly*, 452 F.3d at 530–31.

123. *Lac Courte*, 2021 WL 1341819 at *11.

124. Response Brief of Defendants-Appellees at 31–32, *Lac Courte Orielles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers*, No. 21-1817 (7th Cir. Aug. 27, 2021), ECF No. 36.

125. *Id.* at 31.

126. *Id.*

127. *Id.* at 31–32.

128. *Id.* at 32.

129. *Id.* at 31.

holds title? An initial reading of the primary on-point authority—*Goudy v. Meath*[130] and subsequently *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*[131] and *Cass County*[132]—suggests an equally simple answer: No. Indeed, it seems likely that, given the strength of the language in *Yakima* and, in particular, *Cass County*, the Seventh Circuit will affirm the lower court.

Yet full resolution of the issue implicates questions more central to Indian law. The Seventh Circuit may need to wrestle with many of them. For instance, should the Indian canons of construction be applied consistently, with each new case potentially yielding a fact-specific inquiry? If so, how wide of a lens should courts employ when searching for "unmistakably clear" evidence that Congress intends to abrogate a treaty right? Did the Court mean only *congressional* intent, as the Sixth Circuit suggests,[133] or any federal government action, so long as it appears sufficiently explicit? Could it be time for the Supreme Court to revisit *Cass County* and the ambiguous reasoning from *Goudy* that it rests on? This section discusses how each of these questions frames the case in context.

### *A. Evolution of the Alienability Doctrine: Clear Rule or Historical Anomaly?*

*Cass County* sets out the strongest position for the State: "When Congress makes reservation lands freely alienable, it is unmistakably clear that Congress intends that land to be taxable by state and local governments, unless a contrary intent is clearly manifested."[134]

This reads like a broad rule, dependent only on the condition of alienation. Yet compare the language to the Indian canon formula in *McClanahan v. State Tax Commission of Arizona*: "Indians and Indian property on an Indian reservation are not subject to state taxation except by virtue of express authority conferred upon the State by act of Congress."[135]

The presumption there is in favor of the tribes, and more than an inference is required to dislodge that presumption.[136] At a minimum, Congress must "actually consider[] the conflict between its action . . . and Indian treaty rights."[137] In fact, *McGirt v. Oklahoma* suggests that Congress outright "must say so."[138] Yet the formulation in *Cass County* is the reverse: Alienation itself creates a presumption of congressional intent,

130. 203 U.S. 146 (1906).
131. 502 U.S. 251 (1992).
132. 524 U.S. 103, 115 (1998).
133. Keweenaw Bay Indian Cmty. v. Naftaly, 452 F.3d 514, 530 (2006).
134. Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 113 (1998).
135. 411 U.S. 164, 171 (1973).
136. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 203 (1999).
137. U.S. v. Dion, 476 U.S. 734, 739–40 (1986).
138. 140 S. Ct. 2452, 2462 (2020).

which must then be overcome by "clearly manifest" evidence.[139] This holding makes applying the Indian canons difficult, since the canons provide a "backdrop" to interpreting applicable treaties and federal statutes.[140]

So how did the Court in *Cass County* end up with a rule approaching something like its own *pseudo*-Indian canon? The Court first addressed the issue in *Goudy*, a case decided 90 years earlier, which evaluated a treaty provision exempting allotments from encumbrance or sale until the state legislature and Congress agreed to remove such restrictions.[141] In 1887, the GAA subjected nearly all Indian allottees to the laws of the state in which they resided.[142] Then in 1889, the new state of Washington, per the treaty, granted all allottees alienation "in like manner and with the same effect" as other citizens, removing "all restrictions in reference thereto," and Congress assented.[143] Without citing authority, the *Goudy* Court reasoned it would be "strange" to withdraw federal protection without granting state taxation.[144]

While such an inference might be reasonable, it is not the standard demanded by the Indian canons as articulated by Chief Justice John Marshall.[145] Still, though the *Goudy* Court failed to conduct the factual analysis required for proper deference to the original Indian understanding,[146] it did look for specific congressional intent superseding the treaty, which it found in the GAA's broad grant of state jurisdiction.[147]

*Yakima* similarly involved interpretation of the GAA.[148] There, the Court conducted a canons analysis,[149] but once again seized on the alienation principle as its main authority, rather than specific evidence of congressional intent in the statute.[150] The GAA provisions subjecting allottees to state laws, it said, only "made this implication of § 5 [rendering patented allotments free of encumbrances] explicit."[151]

Thus, by the time the Court faced the issue again in *Cass County*, it determined its Indian canon analysis could end as soon as it found

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139. *Cass County*, 524 U.S. at 113–14.

140. *McClanahan*, 411 U.S. at 172.

141. Goudy v. Meath, 203 U.S. 146, 147 (1906).

142. General Allotment Act, 24 Stat. 388, § 5.

143. *Goudy*, 203 U.S. at 147.

144. *Id.* at 149.

145. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1823) ("The language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of their treaty.")

146. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999).

147. Goudy v. Meath, 203 U.S. 146, 149–50 (1906).

148. County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251 (1992).

149. *Id*. at 257–58.

150. *Id.* at 263.

151. *Id.* at 264.

congressional intent to make the Indian lands in question alienable.[152] That approach conflicts with the letter and spirit of the Indian canons, making it challenging for lower courts to reconcile, as it could be in this case.

### *B. Alienability in Other Areas of Indian Law*

In addition to being difficult to square with the Indian canons, the notion that non-Indian ownership severs treaty rights does not easily reconcile with other areas of Indian law. For instance, a major rationale for the alienation "canon" is that by allowing alienation, Congress intends to withdraw federal protection from those lands.[153] Yet the Supreme Court has held that treaty rights can remain even after a tribe is terminated by Congress.[154] Surely total termination of tribal status expresses a stronger withdrawal of federal protection than alienation.

In another example, Congress passed an act appropriating the Black Hills in South Dakota from the Sioux, which effectively abrogated the Fort Laramie Treaty of 1868.[155] After repeated takings claims brought by the tribe, the U.S Supreme Court ruled in 1980 that the tribe had a valid claim for compensation based on recognized title to lands established under treaty.[156] There, the act of Congress legitimized non-Indian ownership in the same way that alienation under allotment does, but the Court reached a different conclusion.

*Montana v. United States*, the seminal case dealing with tribal authority over non-Indian fee land, involved the Crow Tribe's attempts to regulate hunting and fishing by nonmembers within the reservation's boundaries.[157] There, the Court once again considered treaty rights "in light of the subsequent alienation" of fee lands,[158] ruling that the tribe could not regulate nonmember conduct on fee land owned by nonmembers.[159] It did not, however, articulate whether its analysis rested on the status of the land, identity of the hunter or fisher, identity of the landowner, or some combination thereof. Instead, the Court addressed possible sources of tribal authority in turn: (1) the tribe could not rely on the property right of exclusion to regulate nonmembers on non-Indian fee land,[160] nor (2) could its powers of inherent sovereignty reach there, with few narrow exceptions.[161]

Indeed, *Montana* seems to suggest that the *status of individuals* (both actor and owner) is the primary concern. When considering whether

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152. Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 113 (1998).
153. *Id.* at 105.
154. Menominee Tribe of Indians v. United States, 391 U.S. 404, 412–13 (1968).
155. United States v. Sioux Nation, 448 U.S. 371, 375–83 (1980).
156. *Id.* at 423–24.
157. 450 U.S. 544, 550–51 (1981).
158. *Id.* at 561.
159. *Id.* at 565.
160. *Id.* at 558–59.
161. *Id.* at 565–66.

a relevant statute granted the Crow regulatory authority, the Court said it was limited to Indian land, and that "if Congress wished to extend tribal jurisdiction to lands owned by non-Indians, it could have easily done so."[162] But the Court was only presented with one category: Nonmember activity on nonmember owned fee land. Regardless of rationale, it could definitely say that zone resides within the faintest reach of tribal sovereignty.[163]

The State here argues that since it is well-established states can tax non-Indian fee lands on the reservation, there must be some aspect of treaty abrogation tied to land status, otherwise *all* reservation fee lands would be untaxable.[164] Similarly, the Court in *Yakima* articulated that property taxing authority flows from the status of the *land* itself, rather than the tribal status of its owner, making once-alienated Indian land permanently subject to taxation.[165] This principle seems hard to reconcile with the above examples, in which treaty rights apparently turned on whether the *individual* (or tribe) retained the right(s), not the status of the land itself. It may be time to rework the courts' insistence on a different formula for alienated Indian land.[166]

### *C. The Circuit Split: Does "Congress" Mean Congress?*

The Sixth Circuit in *Naftaly* attempted to circumvent the alienation versus canons problem by distinguishing between lands allotted by the Executive under treaty and those allotted by Congress.[167] Since the rule in *Cass County* predicates on *Congress* making lands alienable, the *Naftaly* court decided *Cass County* did not apply to instances such as the Treaty at issue here, because the Treaty provided for allotment, not Congress. *Naftaly* may be the future; the Supreme Court denied *cert*iorari on the case. Since it happened to analyze lands allotted under the same Treaty, it should be quite persuasive to the Seventh Circuit here.

That said, the district court here found the distinction immaterial, reasoning essentially that the fact of alienation itself irreversibly severs the

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162. *Id.* at 561–62.

163. Montana v. United States, 450 U.S. 544, 565 (1981).

164. Response Brief of Defendants-Appellees at 23, *Lac Courte Orielles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers*, No. 21-1817 (7th Cir. Aug. 27, 2021), ECF No. 36.

165. County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251, 263, 265 (1992).

166. For comparison, the Court has held that states may assess severance taxes on non-Indian oil and gas lessees on tribal land, absent congressional preemption. Those taxes are essentially tariffs on the mineral estate itself, since the lessee's revenue depends entirely on their presence. Yet the Court had no problem tying the tax to the lessee's tribal status. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).

167. Keweenaw Bay Indian Cmty. v. Naftaly, 452 F.3d 514, 530 (6th Cir. 2006).

land from treaty rights, making the source of Congress' intent moot.[168] That logic, however, seems backwards: If alienation could *per se* abrogate a treaty right, the Court would have had no need to keep citing the rule that state taxation is not allowed unless Congress makes its intent "unmistakably clear."[169] A plain reading of *Yakima* and *Cass County*, to the contrary, treats alienation, not the act of abrogation, as presumptive evidence of the requisite congressional intent to abrogate treaty rights.[170]

In supporting its distinction, the *Naftaly* court argues that a treaty by its very nature cannot express the will of Congress.[171] It requires only ratification by one house, and the fact that its provisions have self-executing legal effect does not make them an act of legislation.[172]

Indeed, the Ninth Circuit in *Lummi Indian Tribe v. Whatcom County* recognized that treaty-allotted property "may be hard to square with the requirement . . . that Congress' intent to authorize state taxation of Indians must be unmistakably clear."[173] The difference is more than trivial. If the Seventh Circuit departs from the Sixth and Ninth, going for a broad application of *Cass County* instead, it may further encourage the Supreme Court to resolve the circuit split.

### *D. The Scope of the Indian Canons*

To the extent that courts walk through the Indian canon analysis, as opposed to treating alienation as blanket abrogation of treaty tax immunity, they must determine how far to look for "unmistakably clear" evidence of congressional intent. In *Moe v. Confederated Salish and Kootenai Tribes*, the Court considered a major shift in Indian policy eras, as demonstrated by the IRA, to have a limiting effect on Congress's "intent" in the GAA, the keynote legislation of the previous era.[174] *Goudy* went even broader, essentially imputing commonly accepted property concepts to Congress's thinking,[175] while retaining a textual statutory analysis.[176] And *Yakima* looked at the text and structure of the relevant statutes, suggesting a narrower view.[177]

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168. Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers, 18-CV-992-JDP, __F.Supp.3d__, 2021 WL 1341819, *5–6 (W.D. Wis. Apr. 9, 2021).

169. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 765 (1985).

170. *See* Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 110–11 (1998); *Yakima*, 502 U.S. at 263.

171. *Naftaly*, 452 F.3d at 531.

172. *Id.*

173. Lummi Indian Tribe v. Whatcom Cty, 5 F.3d 1355, 1358 (9th Cir. 1993).

174. Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 478–79 (1976) (cited approvingly by County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251 (1992)).

175. Goudy v. Meath, 203 U.S. 146, 149 (1906).

176. *Id.* at 149–50.

177. County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 262–64 (1992).

As an example of this kind of interpretive problem, consider the State's argument, based on an assertion in *Cass County*, that the Tribes' position on alienation would "render partially superfluous" portions of the IRA.[178] Those provisions explicitly grant tax immunity to former allotted lands that the Secretary of Interior returns to federal trust status.[179] Regardless of who is correct, the IRA could reasonably be interpreted as merely reflecting the reality that so many lands had already been subjected to state tax, irrespective of the *legality* of those actions. Yet the Court's interpretation of Congress's intent in the IRA there—a law only indirectly related to the case—had some bearing on its reasoning.

While it is probably appropriate that no single lens apply to what can often be a fact-intensive inquiry to determine Congressional intent, the subjectivity involved likely increases the temptation for the courts to create more universal rules, such as the one in *Cass County*. As evidenced in the on-point line of cases here, this tends to undercut the special principles of Indian law that have been essential to the field for two centuries.

One possible solution for the Seventh Circuit is to engage in *greater* fact-finding by focusing on the Indian side of the canons—reading treaty rights most favorably to the original signatories as they would have understood them—rather than on the side of congressional intent. This opens up a different set of ambiguities, but at least places the emphasis on degrees of tribal sovereignty, not the extent of congressional power, an important focus in the self-determination era.

Another answer may be simply letting the canons be canons: Keep the bar required to overcome presumptions in favor of the Indians high, so that it tends to resolve some questions of ambiguity regarding congressional intent.

## V. CONCLUSION

Not since *City of Sherill v. Oneida Indian Nation of New York* has the Supreme Court taken a close look at the taxability of former Indian lands reacquired by a tribe or its members. Following the leading cases would suggest that the question is settled. However, as is often the case in Indian law, closer inspection reveals a tangle of competing principles, complex histories, shifting statutory schemes, and piecemeal case law. Often the outcome comes down to the court's disposition toward Indian law itself. Is it a singular field rooted in the structure of the unique historical and political relationship between the United States and indigenous peoples? Or a now-modernized set of law with well-established precedent and detailed rules, as applicable as any other? Or some jagged combination of the two?

178. Response Brief of Defendants-Appellees at 31–32, *Lac Courte Orielles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers*, No. 21-1817 (7th Cir. Aug. 27, 2021), ECF No. 36.

179. Indian Reorganization Act of 1934, 25 U.S.C. § 5104 (2018).

This case's implication of those questions raises a handful of overarching issues: (1) How should the special Indian canons be cast against common law property principles? (2) How wide (and deep) should a court look when divining the intent of Congress per the Indian canons? (3) What does alienability (and alien*ation*) really mean in Indian country? (4) Can the precedent as it relates to taxability of alienated fee lands continue to rest on a seminal hundred-year-old case with vague reasoning? (5) And if so, is that rule avoided wherever Indian lands are allotted by treaty?

The Seventh Circuit here will probably stick with clearly stated precedent in favor of the State, but the Sixth Circuit's distinguishing of *Cass County* opens up the possibility of limiting its application, especially since the State there petitioned for *cert.* and was denied. Given the unusual standalone strength of the alienability rule in the precedent line of cases here, sometimes at odds with the Indian canons, it may be time for the high court to revisit *Goudy* and its progeny.

On the other hand, since at least *Yakima*, and reaching back to *Goudy*, states and local governments have relied on these rules to plan their revenue streams. Still, the categorical rule in *Cass County* notwithstanding, most tribal allotments occurred under the GAA, the taxability of which is not in dispute here, nor is likely to ever be. Would it be reasonable to return formerly allotted tribally owned lands to tax immune status? *Lac Courte* may suggest an answer.