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Sovereignty in the Balance: Taxation by Tribal Governments

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ARTICLE

SOVEREIGNTY IN THE BALANCE: TAXATION BY TRIBAL GOVERNMENTS

*Anna-Marie Tabor**

I. INTRODUCTION 350

II. UNDERSTANDING TRIBAL POWERS TO TAX 353
A. *A Brief History of Federal Indian Policy* 353
B. *Balance of Powers* 360
C. *Tribal Taxes* 365
D. *Taxing Nonmembers After* Montana *and* Colville 368

III. STATE TAXATION 372
A. *State Tax Power* 373
B. *Legal Incidence Versus Economic Burden* 378
1. Defining and Applying Legal Incidence 380
2. The Economic Burden Alternative to the Legal Incidence Test 385

IV. RECLAIMING TAXATION POWERS 389
A. *Preemption* 389
B. *Taxing Nonmembers on Fee Land Under the* Montana *Consent Exception* 394
C. *Taxing Nonmembers on Fee Land Under the* Montana *Self-Governance Exception* 396
D. *Extrajudicial Responses to Tribal Taxation Decisions* 398

V. CONCLUSION 401

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I. INTRODUCTION

The power to tax is a fundamental attribute of Indian tribes' sovereign power. Like all governments, tribal governments need to raise revenue to support their operations and may choose to use fiscal policy to influence economic development. As tribal powers have been reduced by treaties, statutes, and Supreme Court decisions, some degree of tribal taxation authority has been retained throughout the years, and tribes have used their taxation powers successfully to raise revenue and shape incentives for regulatory purposes.

Taxation is more important than ever at this moment in history, as tribal governments look for new ways to channel on-reservation economic development for the benefit of tribal members. Despite frequent news reports about lucrative casinos operated by some tribes,[1] approximately half of all American Indians[2] who live on reservation and trust land live below the poverty level.[3] Self-determination is a key factor in reservation economic development, and federal Indian policy has shifted to grant tribes greater control over the way they organize their affairs and deliver services to their members.[4] Tribal governments can use their taxation powers to fulfill their sovereign roles and address the poverty that continues to plague Indian Country.[5]

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1. *See, e.g.*, Donald L. Barlett & James B. Steele, *Who Gets the Money?*, TIME MAG., Dec. 16, 2002, at 48.

2. The problematic origins of the term "Indian" demand an explanation as to why I use it here. As David Wilkins has noted, while "Indian" and "American Indian" are geographically inaccurate and ignore the great cultural diversity among the indigenous peoples of the United States, they also are "the most common appellation used by many indigenous and nonindigenous persons and by institutions." DAVID WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE, at x (1997). "Native American" is a broader term that is used to indicate Indians, Alaska Natives, and Native Hawaiians. *See* K. Kirke Kickingbird, *Vehicle of Change*, 86 A.B.A. J., at 70 (2000). Accordingly, I follow Wilkins in using the term "Indian" or "American Indian" to refer to individual indigenous persons. WILKINS, *supra*, at x-xi.

3. In 1989, 51% of American Indians living on reservations and trust lands were living below the poverty level. *See* BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, WE THE FIRST AMERICANS 10 (1993), *available at* http://www.census.gov/apsd/wepeople/we-5.pdf (last visited Mar. 22, 2004).

4. WILKINS, *supra* note 2, at 187.

5. "Indian Country" is defined by 18 U.S.C. § 1151 as consisting of:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Unfortunately, the potential for tribes to use taxes for revenue and regulation is limited, and the trend in Supreme Court decisions has been to tighten tribal discretion to tax. Tribes continue to have broad powers to tax the activities of members that take place on reservation land.[6] Their authority to tax nonmembers on reservation land has been significantly limited, however, and the territorial extent of tribal tax powers does not extend to fee simple land within reservation boundaries.[7] Tribes must also contend with competing state taxes, because the Court has been generous with states that wish to impose their own taxes on on-reservation activity.[8] Unlike states, tribes may not engage in competitive taxing to draw nonmembers to reservation retailers.[9] Tribes are further limited in their ability to tax nonmember businesses and consumers because tribal taxes must be collected in addition to state taxes, thereby putting tribal retailers at a competitive disadvantage compared with nonmember, off-reservation businesses.[10]

Current tribal taxation doctrine fails to respect tribal sovereignty and severely curtails tribes' powers to raise revenue and regulate on-reservation conduct. Tribes lack the ability to exercise tax authority in a manner that maximizes tribal welfare. There are explicit limitations imposed by Court decisions, such as *Montana v. United States*,[11] that limit taxation over land and people within reservation boundaries. There are implicit limitations imposed by a series of decisions granting states broad taxation powers within reservations.[12] Additional constraints are imposed by the generally confused analysis in decisions such as *Atkinson Trading Co. v. Shirley*,[13] which leave tribal governments with great uncertainty as to what is permitted and what is forbidden.

Moreover, common law doctrines have become increasingly restrictive at a time when congressional policy has shifted towards granting more expansive powers to tribal governments.[14] The Supreme Court continues to base its decisions on the analysis of statutes that were passed over a century ago in furtherance of policies that have since been unequivocally repudiated, an approach that may reflect concern about how the expanded

18 U.S.C. § 1151; *see also* Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 453 n.2 (1995).

6. *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 652-53 (2001).

7. *See id.* at 651, 653.

8. *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 189 (1989).

9. *See id.*

10. *See id.*

11. 450 U.S. 544 (1981).

12. *See infra* text accompanying notes 163-201.

13. 532 U.S. 645 (2001).

14. David Wilkins, *The Manipulation of Indigenous Status: The Federal Government as Shape Shifter*, 12 STAN. L. & POL'Y REV. 223, 238-40 (2001).

role of tribal governments will affect the power balance between the federal and state governments.[15]

Part II of this Article begins by explaining how courts define the extent of tribal tax power, an exercise that calls for an examination of how federal policies that were abandoned long ago still continue to shape tribal authority. This discussion is followed by a consideration of the balance of power between federal, state, and tribal governments, and by an examination of how this balance is managed in the taxation area by the doctrines of preemption, sovereign immunity, and exhaustion of tribal remedies.

After describing the variety of tribal revenue measures, this Article considers three significant cases that help to define the extent of tribal taxation powers. In *Merrion v. Jicarilla Apache Tribe*,[16] the Court suggested that tribes have retained broad powers to tax nonmembers conducting business within reservation boundaries. *Merrion* must be interpreted in light of *Washington v. Confederated Tribes of the Colville Indian Reservation*,[17] however, which requires tribal taxes to compete with overlapping state taxes. The Court's recent decision in *Atkinson Trading Co.* made it clear that the broad tax authority recognized in *Merrion* is limited to reservation land, and tribal tax power over activity on fee simple land is very constrained.[18]

Part III considers how state tax jurisdiction imposes further limitations on tribal tax authority. Section III.A focuses on the implications of the Court's decision in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*.[19] While state taxation powers are limited over tribal members who live or engage in activity within Indian Country, jurisdiction substantially expands when nonmembers enter Indian Country and when members leave the reservation. This results in substantial areas of concurrent tax jurisdiction, so that even where tribes retain taxation powers, their programs may need to be administered on a background of state taxation over which the tribes have no control. Overlapping state taxes reduce the revenue potential of tribal taxes, frustrate tribal regulatory intentions, and generally impede the tribes' exercise of their inherent sovereign power to tax.

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15. *Id.* at 275; Scott A. Taylor, *State Property Taxation of Tribal Fee Lands Located Within Reservation Boundaries: Reconsidering* County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation *and* Leech Lake Band of Chippewa Indians v. Cass County, 23 AM. INDIAN L. REV. 55, 83 (1998).

16. 455 U.S. 130, 137 (1982).

17. 447 U.S. 134, 158-59 (1980).

18. *Atkinson Trading Co.*, 532 U.S. at 653.

19. 502 U.S. 251 (1992).

The validity of both state and tribal taxes depends on their legal incidence. Section III.B explains the nature of this test and argues that it has been applied in an unpredictable manner despite its textual basis. Prior to adopting the legal incidence test, the Court gave broader consideration to the economic effects of taxes. This Article contends that an economic burden test is preferable to the legal incidence test because it better enables the Court to guard against state intrusions on tribal sovereignty.

Due to judicially-imposed limitations, tribes that wish to exercise their sovereign power to tax must carefully craft provisions that cannot be struck down. Part IV will suggest some possibilities, explaining how tribes might act to preempt competing state taxes and how they can draft statutes that fall under the *Montana* exceptions.

The provisions proposed in Part IV are complicated because the law so strongly disfavors tribal tax authority. Accordingly, non-judicial solutions may be more successful in restoring tribal taxation powers. This Article concludes with a brief consideration of legislation and government-to-government agreements on taxation. Such efforts can help tribes exercise sovereignty through taxation despite the restrictive legal climate.

II. UNDERSTANDING TRIBAL POWERS TO TAX

A. *A Brief History of Federal Indian Policy*

The shape of federal Indian policy has changed frequently and dramatically over the country's history, and so has the judicial understanding of tribal sovereignty. Yet each has moved along its own path, and as statutory law has granted additional powers to tribes, court-made law has imposed new limitations. Prior to 1871, when Congress passed a statute forbidding treaty-making with tribes,[20] common law doctrines reflected a view that tribes were sovereign nations with sovereign powers.[21] The doctrine that tribes were "domestic, dependent

20. Indian Appropriation Act of Mar. 3, 1871, 16 Stat. 544, 566 (1871). Prior to this enactment, relations with Indian tribes were governed primarily by Senate treaties. The House of Representatives had been trying unsuccessfully for a number of years to create a larger role for itself in shaping Indian policy, refusing at one point to appropriate funding for new treaties. This led to the passage of the 1871 Act. Antoine v. Washington, 420 U.S. 194, 201-02 (1975).

21. Professor Wilkins argues that Marshall superimposed notions of federal supremacy over Indian tribal sovereignty, creating an often confusing body of doctrine based alternately on Indians' political, racial, and individual statuses. *See* Wilkins, *supra* note 14, at 224.

nations," however, limited tribal sovereignty in these early years,[22] and more recently has been used by the Court to justify sharp constraints on tribal powers.[23]

The allotment period, which began in the 1860s, is especially relevant to the current law regarding tribal tax authority.[24] Federal officials believed that the elimination of communal land ownership was necessary to "civilize" the tribes, and they pursued policies to speed this process.[25] As Justice Scalia has explained, "[t]he objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large."[26]

Congress passed the General Allotment Act,[27] which provided that trust lands be divided and granted, or patented,[28] to individual Indians.[29] Pursuant to this statute, the government issued patents to allottees, but continued to hold the individual allotments in trust for an additional twenty-five years before granting a fee simple title,[30] at which point allottees and allotted land became subject to both civil and criminal state laws.[31] The Burke Act of 1906[32] amended the General Allotment Act to

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22. *See* Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 192 (2001).

23. *See, e.g.*, Montana v. United States, 450 U.S. 544, 564 (1981) ("exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation").

24. *See* WILKINS, *supra* note 2, at 64-65.

25. Taylor, *supra* note 15, at 65.

26. County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 254 (1992).

27. General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-354 (2004)).

28. *Black's Law Dictionary*, 7th edition, defines a land patent as "[a]n instrument by which the government conveys a grant of public land to a private person." BLACK'S LAW DICTIONARY 1147 (7th ed. 1999).

29. General Allotment Act of 1887 § 1, 24 Stat. 388.

30. *Id.* § 5, 24 Stat. 389-90.

31. The Act stated:

> [U]pon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside . . . .

give the Secretary of the Interior discretionary authority to grant full title to allottees "whenever [the Secretary] shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs . . .," even if the full trust period had not passed.[33] The Burke Act specified that once the Secretary granted a fee simple title, the land no longer would be under exclusive federal jurisdiction, but would become subject to taxation by the state.[34] The Supreme Court has held that fee simple land has the same legal status whether the fee simple title was granted under the original General Allotment Act or the Burke Act.[35] Land was allotted pursuant to other federal statutes as well, although the General Allotment Act and the Burke Act have figured most prominently in the case law addressing jurisdiction over allotted land.[36]

The allotment system proved ineffective as a method of assimilation, and it also resulted in the widespread loss of Indian lands. Two-thirds of tribal lands were transferred to non-Indians once alienation restrictions were lifted.[37] Those allottees who avoided selling their land to speculators were often foreclosed upon because of nonpayment of state taxes.[38] Allotment has continued to create problems for the tribes long after the policies themselves ended. In addition to the policies' direct, long-term impact on members and tribes that lost land, the land status "checkerboard" created within Indian Country has created a jurisdictional conundrum for courts and legislatures and weakened tribal power by making the scope of self-governance uncertain.

Federal policies took a sharp turn in 1934 with the passage of the Indian Reorganization Act, which was enacted to roll back the policies of

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Id. § 6. This language is ambiguous as to whether state jurisdiction extends when the allotments are made or at the end of the twenty-five year restricted period. Congress passed the Burke Act to clarify this point. *See Yakima Indian Nation*, 502 U.S. at 255.

32. Burke Act of 1906, ch. 2348, 34 Stat. 182.

33. *Id.*

34. The statute says that after fee simple title is issued,

> all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States.

Id.

35. *See Yakima Indian Nation*, 502 U.S. at 264.

36. *See id.* at 270. For a discussion of other allotment statutes, see WILKINS, *supra* note 2, at 64; U.S. DEP'T OF THE INTERIOR, HANDBOOK OF FEDERAL INDIAN LAW 63-64 (1942).

37. Taylor, *supra* note 15, at 68.

38. *Id.*

the allotment period.[39] The Act declared an end to allotments of tribal land, while extending indefinitely not only the trust status of remaining non-allotted trust lands, but also the restrictions placed on land that had been allotted, but not yet granted in fee simple.[40] This left an additional complication in the pattern of land status within reservation boundaries, because, in addition to fee-simple and reservation land, a third category – land that had been allotted, but for which fee simple title was never granted – also continued to exist. This land should be treated like trust land, since it never attained fee status, but unlike other trust land, judicial analysis of its status might be affected by the legislative purpose behind the Indian Reorganization Act.[41]

In addition to halting allotment policies, the Indian Reorganization Act authorized the Secretary to take new lands into trust and to create new reservations,[42] noting that such lands "shall be exempt from State and local taxation."[43] It also included provisions under which tribes could create constitutions and bylaws and receive a charter of incorporation from the Secretary of the Interior.[44]

The policies embodied in the Indian Reorganization Act that encouraged tribal self-governance and economic development did not last long, however, and in the 1950s federal policy once again shifted against tribal power. The new policy favored termination of Indian tribes and elimination of the trust relationship with the federal government in order

39. Indian Reorganization Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-479 (2004)); *see* WILKINS, *supra* note 2, at 118.

40. Indian Reorganization Act of 1934, §§ 1-2.

41. *See* County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 255 (1992).

42. Indian Reorganization Act of 1934, §§ 4, 7.

43. *Id.* § 5.

44. *Id.* §§ 16-17. This statute is the focus of *Mescalero Apache Tribe v. Jones*. The Mescalero Apache Tribe built a ski resort on land adjacent to the reservation with funding provided under section 10 of the Act. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 146 (1973). The Court rejected the argument that the project was a federal government instrumentality immune from state taxation under the Indian Reorganization Act. *Id.* at 150-55. The Court also interpreted the section 5 state tax exemption to apply to "land and rights in land, not income derived from its use." *Id.* at 155. Thus the Court found that nondiscriminatory taxes on income earned by the ski resort were permitted, but that a compensating use tax imposed on permanent improvements to the property could not be imposed. *Id.* at 157-58.

Robert A. Williams suggests that the concepts of self-government that formed the basis for the Indian Reorganization Act conflicted with traditional values. "The infusion of non-Indian political and social values and institutions into tribal life created tensions and destructive factions, which continue to impede Indian progress today." Robert A. Williams, Jr., *Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Governmental Tax Status Act of 1982*, 22 HARV. J. ON LEGIS. 335, 353 (1985).

to facilitate assimilation.[45] The termination policies were abandoned by the 1960s,[46] but not before generating additional legal complications for affected tribes.[47]

The end of the termination policies began a period in which federal policy focused on self-determination and economic development within a framework of government-to-government relations.[48] The Indian Self-Determination and Education Assistance Act of 1975 strengthened the role of tribal governments in the administration of federal programs.[49] Other enactments attempted to put tribal governments on par with state and local governments in the receipt of certain federal benefits.[50]

Tribal government power and influence has increased dramatically since the 1980s with the expansion of Indian gaming. The Indian Gaming Regulatory Act (IGRA), passed in 1988, created a framework for federal, state, and tribal governments to coordinate oversight of gaming operations.[51] In 2001, gross tribal government revenues from Indian gaming totaled $12.7 billion.[52] Not all tribes have developed gaming business, and some tribes that have are reaping only modest profits.[53] Nonetheless, the astronomical revenues generated by some casinos support a powerful lobby for tribal interests at both the state and national levels.[54] As a result, while poverty remains pervasive, some tribes are poised to assert their unique legal status with greater strength than would have been conceivable just twenty years ago.

At the same time that Congress was backing off its historically oppressive legislative policies, the courts were restricting tribal powers,

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45. WILKINS, *supra* note 2, at 166.

46. Williams, *supra* note 44, at 354.

47. *See, e.g.*, Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968) (dispute over whether tribal sovereignty over hunting and fishing rights had been terminated).

48. WILKINS, *supra* note 2, at 187 (explaining how the passage of the Indian Self-Determination and Education Assistance Act in 1975 led to a period of greater tribal involvement in tribal administration).

49. *Id.*

50. *See* Wilkins, *supra* note 14, at 230-32.

51. Indian Gaming Regulatory Act of Oct. 17, 1988, Pub. L. No. 100-497, 102 Stat. 2467-2486 (codified at 25 U.S.C. §§ 2701-2721 (2004)).

52. *Indian Gaming Regulatory Act: Hearing Before the Senate Comm. on Indian Affairs*, 108th Cong. 41 (2003) (prepared statement of Ernest L. Stevens, Jr., Chairman, Nat'l Indian Gaming Comm'n).

53. *See generally* Bartlett & Steele, *supra* note 1, at 48 (Oglala Sioux annual profit totaled $2.4 million to be spread over 41,000 tribe members).

54. *See generally* Donald L. Bartlett & James B. Steele, *Playing the Political Slots*, TIME MAG., Dec. 23, 2002, at 52 (aggressive lobbying by Mississippi Band of Choctaw Indians won the insertion of a provision worth $180,000 a year into federal appropriations bill).

both explicitly and by casting doubt on the extent of tribal sovereignty.[55] One of the most significant cases decided during this period was *Montana v. United States*, which struck down hunting and fishing regulations that had been imposed by the Crow Tribe on non-Indians who had entered onto lands within the outer boundaries of the reservation that were held in fee-simple by non-Indians.[56] The Court stated a "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" in the absence of congressional authorization, and went on to find two exceptions to the rule.[57] First, tribal regulation, including taxation, was allowed when the nonmembers whose activity was regulated had entered consensual relationships with either the tribe or its members.[58] Second, tribal regulation was allowed when the regulated conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[59] The *Montana* Court failed to provide much guidance as to the content of either of the exceptions, but later opinions have interpreted both narrowly.[60]

In particular, two cases decided in 2001 substantially limited the *Montana* exceptions. In *Atkinson Trading Co. v. Shirley*,[61] the Navajo Nation imposed a hotel occupancy tax of eight percent on all hotel rooms within the reservation, including those located on land held in fee simple that were owned or operated by nonmembers and occupied by nonmember guests.[62] The case involved a hotel that was owned by a nonmember company and was located on fee-simple land within the reservation.[63] The Court assumed that the guests at the hotel were nonmembers.[64] Noting that

55. *See* WILKINS, *supra* note 2, at 236-37.

56. Montana v. United States, 450 U.S. 544, 567 (1981).

57. *Id.* at 565.

58. *Id.*

59. *Id.* at 565-66.

60. *See, e.g.*, Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001) (Navajo Nation may not impose hotel occupancy tax on rooms at a hotel located on land held in fee simple within the reservation); Nevada v. Hicks, 533 U.S. 353 (2001) (Indians' right to make and be governed by their own laws does not include the right to assert jurisdication over tort claims against state officers who enter the reservation to execute state process in connection with a violation of state laws that occurred off the reservation); Strate v. A-1 Contractors, 520 U.S. 438 (1997) (subcontract between defendant and the reservation was inadequate to meet the first exception, and careless driving was inadequate to meet the second exception); Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (limiting tribe's power to zone fee simple lands within the reservation).

61. *Atkinson Trading Co.*, 532 U.S. at 645.

62. *Id.* at 648.

63. *Id.* at 647-48.

64. *See id.* at 654.

Congress had not authorized the tax,[65] the Court analyzed the provision and found that it failed to meet the requirements of either *Montana* exception. While the hotel benefited from services provided by the Navajo Nation, the resulting relationship did not rise to the level required under *Montana*.[66] Furthermore, "[a] nonmember's consensual relationship in one area . . . does not trigger tribal civil authority in another — it is not 'in for a penny, in for a Pound.'"[67] Therefore, even if an adequate consensual relationship existed between the hotel and the tribe, it would not justify jurisdiction to tax the hotel's guests.[68]

The Supreme Court's subsequent opinion in a non-tax case, *Nevada v. Hicks*,[69] suggested that the *Montana* exceptions might be applied more narrowly in the future, focusing on whether, in the absence of congressional authorization, tribal jurisdiction was "necessary to protect tribal self-government or to control internal relations."[70] The Court in *Hicks* found that tribal courts could not exercise jurisdiction over a section 1983 claim[71] "against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation."[72] The opinion leaned towards eliminating land status as a factor in determining tribal jurisdiction, noting that although, "[h]itherto, the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction . . . [,] the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers."[73] Later in the opinion, however, in response to Justice O'Connor's dissent, Justice Scalia wrote that "tribal ownership is a factor in the *Montana* analysis, and a factor significant enough that it 'may sometimes be . . . dispositive[.]'"[74] The latter statement may be a more accurate appraisal of the current state of the law.[75] Subsequent lower court

65. *Id.*

66. *Atkinson Trading Co.*, 532 U.S. at 655.

67. *Id.* at 656 (citation omitted).

68. *Id.* at 657.

69. 533 U.S. 353 (2001).

70. *Id.* at 360 (quoting Montana v. United States, 450 U.S. 544, 564 (1981)). The Court dismissed the consent prong of *Montana* by determining that it applied only to private consensual relationships and not to official acts. *Id.* at 359 n.3.

71. 42 U.S.C. § 1983 (permitting a plaintiff to bring a civil claim for the violation of rights that arise under either the U.S. Constitution or federal statute when the violation has been committed under color of state law).

72. *Hicks*, 533 U.S. at 355.

73. *Id.* at 360.

74. *Id.* at 370 (citation omitted).

75. Even if Justice Rehnquist's view were that land status has no relevance to determining tribal jurisdiction, five justices appear to believe that it is significant. Justice Ginsburg's concurring opinion in *Hicks* suggests that land status was a significant factor in the finding in *Strate v. A-1*

decisions have generally limited the holding in *Hicks* to the facts of the case, suggesting that the opinion will have little impact on the extent of tribal tax jurisdiction.[76]

The majority opinions in *Atkinson Trading Co.* and *Hicks* demonstrate how historical, restrictive legislative policies that have since been repudiated continue to impact tribal sovereignty. Thirty years have passed since Congress replaced policies that had been intended to eliminate tribes as political entities with policies that encourage self-governance. The legislative intent of the Congress that passed the General Allotment Act was to eliminate the tribes on all levels, including as political entities.[77] The policies behind the legislation have been completely repudiated since its passage, and the most recent trend in congressional policy has been to build up the powers of tribal governments.[78] The Supreme Court has nonetheless maintained the repudiated system of land status that developed during the anti-sovereignty period in order to limit tribal powers, including the power to tax. In effect, these new restrictive common law doctrines reign in tribal authority at a historical moment when tribes are otherwise poised to assume more prominent political and economic roles.

B. *Balance of Powers*

Throughout the history of tribal jurisdiction, the balance between federal, state, and tribal powers has been a persistent theme.[79] The relationship between tribes and the federal government is distinct from the relationship between the states and the federal government. Tribal sovereignty differs from state sovereignty, and tribal rights and obligations

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Contractors, 520 U.S. 438, 456 (1997), that the tribe lacked jurisdiction over the nonmember driver who was involved in an accident on the equivalent of "alienated, non-Indian land[,]" although she also said that both *Strate* and *Hicks* left open the question of whether the tribe has jurisdiction over nonmember conduct on tribal land. *Id.* at 386 (Ginsburg, J., concurring). Justice O'Connor's opinion concurring in part and concurring in the judgment on *Hicks*, which was joined by Justices Stevens and Breyer, clearly states that land status is "an important factor in determining the scope of a tribe's civil jurisdiction." *Id.* at 389 (O'Connor, J., concurring). Finally, although Justice Rehnquist joined Justice Scalia's opinion in *Hicks*, the analysis in his *Atkinson Trading Co.* opinion relied heavily on land status. *See Hicks*, 533 U.S. at 354; Atkinson Trading Co. v. Shirley, 532 U.S. 645, 653 (2001).

76. *See, e.g.*, McDonald v. Means, 300 F.3d 1037 (9th Cir. 2002); Wisconsin v. E.P.A., 266 F.3d 741 (7th Cir. 2001); Fidelity & Guaranty Ins. Co. v. Bradley, 212 F. Supp. 2d 163 (W.D.N.C. 2002).

77. Taylor, *supra* note 15, at 83.

78. *See id.*; Williams, *supra* note 44.

79. For an examination of federal, state, and tribal taxation interests, see Jennifer Nutt Carleton, *State Income Taxation of Nonmember Indians in Indian Country*, 27 AM. INDIAN L. REV. 253, 273-79 (2003).

vis à vis the federal government are different from those of the states.[80] Yet federal, state, and tribal powers are closely intertwined with shifting alliances of interests that sometimes put the tribes in opposition to the federal government, but sometimes pit the federal government against the states to uphold tribal rights.[81]

The balance of powers is related to the interplay of federal, state, and tribal interests. At times, tribal and federal interests are aligned.[82] Congress's plenary power over Indian affairs and the federal government's trust relationship to Indian tribes often lead to Justice Department participation on behalf of the tribes in disputes against the states.[83] Tribes organized under the Indian Reorganization Act may adopt constitutions and bylaws with the approval of the Secretary of the Interior.[84] As a result, when states challenge these enactments, the states challenge the Secretary's actions.

The connection between federal and tribal interests is incorporated into the federal Indian law doctrine of preemption, which differs from ordinary preemption. Indian law preemption, which will be considered in more detail *infra*, calls for a fact-specific balancing of state, federal, and tribal interests.[85] Theoretically, a court might find preemption solely on the basis of weighty tribal interests, but preemption decisions have more often been based on strong federal interests that make state action inappropriate.[86] As

80. *See, e.g.*, *Atkinson Trading Co.*, 532 U.S. at 653 n.5 (dismissing analogies between state and tribal taxing authority).

81. *See* Wilkins, *supra* note 14, at 224.

82. *See* Carleton, *supra* note 79, at 275-76.

83. This coincidence of interests is illustrated in amicus briefs filed by the U.S. government on behalf of the tribes. *See, e.g.*, *Atkinson Trading Co.*, 532 U.S. at 656.

84. *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 326 (1983).

85. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 176 (1989).

86. *See, e.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (state taxes on non-tribal corporations conducting business solely on tribal land are preempted by federal legislation in the area of timber management and by BIA management efforts); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 480-81 (1976), stating that

> [P]ersonal property tax on personal property located within the reservation; the vendor license fee sought to be applied to a reservation Indian conducting a cigarette business for the Tribe on reservation land; and the cigarette sales tax, as applied to on-reservation sales by Indians to Indians, conflict with the congressional statutes which provide the basis for decision with respect to such impositions.

Id. (citations omitted); Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685 (1965) (Federal Indian trader statutes preempt state income tax imposed on licensed trader).

a result, in many situations, the strongest argument for tribal jurisdiction may be the existence of federal interests as demonstrated by heavy involvement of the federal government in a particular area of tribal life.[87]

Under different circumstances, federal involvement in Indian affairs may have the effect of reducing tribal sovereignty, since Congress's plenary power to regulate Indian affairs includes the power to abrogate tribal powers.[88] When courts find that Congress has abrogated certain rights, or that tribes lack exclusive regulatory powers, the corollary is that those rights or powers lie elsewhere. In the field of taxation, those rights or powers generally lie with the states.

For example, in *Atkinson Trading Co.*, the Court noted that tribal sovereignty had been limited by treaties and statutes subsequent to the tribes' original incorporation into the United States, reducing tribal jurisdiction over nonmembers and nontribal land.[89] The Court had held in prior decisions that states retain broad taxing authority over their residents, even when tribal activity is involved.[90] In the context of the hotel room taxes at issue in *Atkinson Trading Co.*, this means that states retain broad tax authority over nonmember hotel guests to the exclusion of tribal authority. By finding tribal powers abrogated over nonmember activity on fee land, the Court effectively preserved those powers to the exclusive jurisdiction of the states. Thus, although "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States[,]"[91] Congress nevertheless may effectively grant powers to the states when it limits tribal rights.

When a tribal tax statute's validity is challenged, tribal sovereign immunity limits judicial review unless there has been a clear tribal waiver or congressional abrogation.[92] For example, the Ninth Circuit held that sovereign immunity protected a tribe from a suit challenging a possessory interest tax, noting that an exception would be made if the tribe had made an "express and unequivocal waiver," or if immunity had been limited by Congress.[93] It appears, however, that the doctrine does not bar suits in all

87. *See generally, e.g., Mescalero Apache Tribe*, 462 U.S. at 324 (substantial partnership between federal government and tribe to develop resort on the reservation, including development of game resources, preempted state hunting and fishing regulations).

88. *See Cotton Petroleum*, 490 U.S. at 192.

89. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 650-51 (2001).

90. *See* Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 462-63 (1995).

91. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153 (1980).

92. *See* Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991).

93. Burlington N. R.R. Co. v. Blackfeet Tribe of Blackfeet Indian Reservation, 924 F.2d 899, 901 (9th Cir. 1991).

contexts, as the Supreme Court has upheld tribal taxes in cases brought directly against tribes without considering the issue of sovereign immunity.[94] The Court has also found tribal statutes invalid in suits brought against tribal officers, suggesting that sovereign immunity does not bar officer suits.[95]

In theory, sovereign immunity protects tribes against enforcement actions by states to collect state taxes, even when they are validly imposed.[96] For example, the state cannot collect lost revenues from tribal retailers that conduct business with nonmembers and fail to collect the required state sales taxes.[97] The tribe cannot waive its immunity merely by availing itself of the federal courts for adjudication of the validity of a state tax. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*,[98] the Court held that the Tribe did not waive sovereign immunity by filing for an injunction to stop a state tax assessment on a tribally-operated convenience store located on trust land that sold cigarettes to nonmembers without collecting the state cigarette tax, although the state was not barred from imposing collection requirements on the retailers.[99] The Court said that states could negotiate with tribes to create agreements regarding tax collection, and the states could also lobby Congress to obtain legislation abrogating tribal sovereign immunity under these circumstances.[100] The Court also indicated that the state might be able to file suit against tribal officers or against the wholesalers supplying the retailers with cigarettes.[101]

Although the Court did not consider the sovereign immunity question in *Atkinson Trading Co.*, its invalidation of the Navajo Nation's hotel occupancy tax in a suit against Navajo Nation officers suggests that the protections afforded by *Potawatomi Indian Tribe* are not sufficient to bar challenges to tribal tax statutes. The potential for officer suits creates an exception that may swallow the rule of tribal sovereign immunity, even though the likelihood of recovering the full value of uncollected taxes may be less in a suit against individual officers. States also may be able to pursue taxes owed by tribes if states can attach fee-simple land owned by

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94. *See, e.g.*, Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985).

95. *See, e.g.*, Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001); *Blackfeet Tribe*, 924 F.2d at 901-02 ("[T]ribal officials are not immune from suit to test the constitutionality of the taxes they seek to collect.").

96. *See generally Potawatomi Indian Tribe*, 498 U.S. at 505 (holding that sovereign immunity precluded Oklahoma from taxing sales of goods to tribe members).

97. *See id.*

98. *Id.*

99. *See id.* at 511-14.

100. *Id.* at 514.

101. *See Potawatomi Indian Tribe*, 498 U.S. at 514.

the tribe. However, there is some support for the argument that tribal sovereign immunity should extend to land owned by the tribe.[102]

In theory, plaintiffs wishing to challenge tribal tax provisions must first exhaust tribal court remedies before they bring a claim to the federal courts.[103] The doctrine of exhaustion of tribal remedies requires that questions about the extent of a tribe's civil jurisdiction be first considered by tribal courts to encourage tribal self-government and to allow the federal courts to benefit from the tribal courts' expertise.[104] Litigants who wish to challenge the tribal court's jurisdiction to determine the validity of a tax provision may bring a separate claim in federal court after the tribal court has had an opportunity to determine the issue.[105] However, an exception to the exhaustion requirement will be made when tribal jurisdiction is asserted to harass or is otherwise in bad faith, "where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction."[106] Since the exhaustion doctrine was announced in the 1985 *National Farmers* decision, the Supreme Court has not heard a tax case directly raising the doctrine's applicability.[107] The Eighth Circuit has rejected challenges to tribal tax provisions on the grounds that the plaintiffs failed to exhaust tribal remedies,[108] although the Ninth Circuit has been more reluctant to require exhaustion.[109]

The exhaustion doctrine provides only limited protection to tribal tax powers. The doctrine's exceptions are poorly defined and a court could

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102. *See infra* text accompanying notes 200-01.

103. *See* Reservation Tel. Coop. v. Three Affiliated Tribes of the Fort Berthold Reservation, 76 F.3d 181, 186 (8th Cir. 1996); Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1294, 1299-1300 (8th Cir. 1994).

104. *See* National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 856-57 (1985).

105. *See, e.g.*, Atkinson Trading Co. v. Shirley, 532 U.S. 645, 648-49 (2001).

106. *National Farmers*, 471 U.S. at 856 n.21.

107. The exhaustion doctrine was not an issue in *Atkinson Trading Co.* because the challenge to the tax was first brought before the Navajo Tax Commission and the Navajo Supreme Court. *See Atkinson Trading Co.*, 532 U.S. at 648-49.

108. *See Reservation Tel. Coop.*, 76 F.3d at 186; *Duncan Energy Co.*, 27 F.3d at 1294; *see generally* Texaco, Inc. v. Hale, 81 F.3d 934 (10th Cir. 1996) (no clear error by district court when it dismissed a challenge to severance and business activity taxes for failure to exhaust tribal remedies).

109. *See, e.g.*, Burlington Northern R.R. v. Blackfeet Tribe of Blackfeet Indian Reservation, 924 F.2d 899, 901 n.2 (9th Cir. 1991) (in upholding tribal imposition of possessory tax on railroad easements, the circuit court found that exhaustion of tribal remedies was unnecessary because there were no tribal law issues and no pending case before a tribal court, tribal courts would not have special expertise on the issue, and district court decisions regarding the federal law issues would not have been aided by exhaustion).

avoid requiring exhaustion by finding that a tax provision was "patently violative" of express jurisdictional provisions. Exhaustion does not prevent federal courts from exercising jurisdiction to determine the validity of tribal tax provisions after the tribal adjudication is complete. Federal courts reviewing tribal court decisions defer to tribal courts and review fact findings under a clearly erroneous standard, but the tribal court's jurisdiction is a question of federal law and is afforded de novo review.[110] If the federal court rules against jurisdiction following a plaintiff's unsuccessful challenge to a tax provision in tribal court, then exhaustion will merely postpone invalidation of the statute.[111]

C. *Tribal Taxes*

Taxation is one of the inherent sovereign powers of tribes, "a necessary instrument of self-government and territorial management."[112] Like other sovereign powers, tribes need the ability to collect tax revenue in order to fund governmental services.[113] In addition, tribes may implement tax strategies to create incentives or disincentives for particular activities on the reservation.[114]

Discussions of tribal taxes by the courts treat the provisions almost exclusively as revenue raising measures. Although most tribes suffer from a weak tax base,[115] some have managed to raise substantial funds by imposing taxes on wealthy businesses operating on the reservation, or on high-volume commercial transactions connected with the reservation. The success of revenue measures often relies on the power to tax nonmembers and on whether competing state taxes limit the tax that tribes can impose without driving business off of the reservation. For example, a tax imposed by the Colville Indian Reservation on cigarette sales raised about $266,000 between 1972 and 1976, a period when cigarette vendors on the reservation charged tribal taxes in lieu of state taxes before the Supreme Court determined that states can require tribal retailers to collect state taxes.[116] Tribes with significant natural resources on their reservations

110. *Duncan Energy Co.*, 27 F.3d at 1300.

111. *See Atkinson Trading Co.*, 532 U.S. at 659.

112. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982).

113. *Id.*

114. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 156 (1980).

115. *See* Williams, *supra* note 44, at 385 (criticizing the Tribal Tax Status Act of 1982 for failing to address economic development on Indian reservations, thus giving the tribes "[o]nly the theoretical ability to exercise broadly based taxing authority over a nonexistent tax base.").

116. *Colville*, 447 U.S. at 144. During that period, the tribe attracted nonmembers onto the reservation to purchase cigarettes by charging its own tax in lieu of the higher state cigarette tax.

have larger and more stable tax bases, and therefore have especially large revenue-raising potential.[117] The severance tax imposed by the Jicarilla Apache Tribe on nonmember mineral companies with on-reservation oil and gas leases had the potential to raise over $2 million per year.[118]

Tribes also may impose taxes in order to exert regulatory power over natural resource exploitation, pollution, alcohol sales, or other activities.[119] The Supreme Court has suggested that under the right circumstances, such taxes might preempt similar state taxes.[120] Preemptive taxes would likely need to be part of a broad regulatory program, such as the program to develop tribal resources described in *New Mexico v. Mescalero Apache Tribe*.[121] Areas that are particularly promising for tribal taxation are discussed at greater length in Part IV.

Tribal taxes take a wide variety of forms. Tribes tax nonmember, on-reservation business activity by imposing privilege taxes,[122] business activity taxes,[123] excise taxes,[124] and *ad valorem* taxes on goods and services.[125] Tribes may impose severance taxes and possessory interest taxes on nontribal businesses that exploit mineral, gas, or other natural

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Id. at 142. The tribe's revenue-collecting powers were reduced by the Supreme Court, which held that the state could require that state taxes be collected on cigarette sales to nonmembers. *Id.* at 161.

117. *See, e.g.*, *Merrion*, 455 U.S. at 130; Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 163 (1989).

118. *Merrion*, 455 U.S. at 167 (Stevens, J., dissenting).

119. *See* SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 232-33 (1989).

120. *See Colville*, 447 U.S. at 156.

121. In *New Mexico v. Mescalero Apache Tribe*, the Court found that New Mexico could not impose its hunting and fishing regulations on on-reservation hunting because the regulations were preempted by the extensive program developed by the Tribe in conjunction with the federal government to manage game on the reservation. 462 U.S. 324 (1983). Hunting and fishing licensing could be viewed as similar to taxation to the extent that the licensing fee is effectively a tax on the activity. Tulee v. Washington, 315 U.S. 681, 685 (1942).

122. A privilege tax is "a tax on the privilege of carrying on a business or occupation for which a license or franchise is required." BLACK'S LAW DICTIONARY 1471 (7th ed. 1999); *see, e.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 167-68 (1989); Cherokee Tribal Code, ch. 105, §§ 30-33, *available at* http://doc.narf.org/nill/Codes/ebcicode/eccodech105tax.htm (last visited July 23, 2004).

123. *See, e.g.*, Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195, 197 (1985) (Navajo Tribe imposed business activity tax "on receipts from the sale of property produced or extracted within the Navajo Nation, and from the sale of services within the nation").

124. Excise taxes are imposed "on the manufacture, sale, or use of goods . . . or on an occupation or activity." BLACK'S LAW DICTIONARY 585 (7th ed. 1999); *see, e.g.*, *Colville*, 447 U.S. at 144 (licensed Indian traders sell cigarettes at wholesale price plus a forty to fifty cent tax).

125. An *ad valorem* tax is imposed "proportional on the value" of the thing taxed. BLACK'S LAW DICTIONARY 1469 (7th ed. 1999); *see, e.g.*, Atkinson Trading Co. v. Shirley, 532 U.S. 645, 648 (2001) (Navajo Nation imposed eight percent hotel occupancy tax on hotel rooms within the reservation).

resources on the reservation. Severance taxes take the form of a charge per unit of the product removed from land within the reservation, and have been upheld by the Supreme Court as a valid exercise of tribal sovereignty.[126] In lieu of property taxes, tribes may impose possessory interest taxes on the value of property leased within the reservation.[127] For example, the Eighth and Ninth Circuits have upheld taxes on easements granted to railroads and utility companies.[128]

In the past, tribes have claimed tax exemptions for tribal retailers, and then marketed the exemptions to non-Indians in order to increase commerce and raise tribal revenues.[129] In *Washington v. Confederated Tribes of the Colville Reservation*,[130] the Court held that such practices were impermissible because they interfered with state taxation powers. The Court rejected the argument that state taxes should be preempted by the tribal taxes, stating that "[t]here is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other."[131] Because the tribal scheme relied on an exemption from state taxes, however, the imposition of the state tax effectively ousted the tribal taxes by making it impossible for the tribes to impose their own taxes without making products sold on the reservation non-price competitive. The Court left open the possibility that the tribes could enact a regulatory program to curb smoking that would preempt state taxes.[132] However, it is unclear what would qualify as such a program, because the opinion also noted that existing ordinances "comprehensively regulat[ing] the marketing of cigarettes by the tribal enterprises" did not preempt state excise taxes on sales of cigarettes to

126. *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 136 (1982) ("[t]he tax is assessed at the wellhead at $0.05 per million Btu's of gas produced and $0.29 per barrel of crude oil or condensate produced on the reservation, and it is due at the time of severance"); *see also* Mustang Prod. Co. v. Harrison, 94 F.3d 1382, 1386 (1996) (upholding severance tax imposed on allotted land held in trust).

127. *See, e.g.*, *Cotton Petroleum Corp.*, 490 U.S. at 168 n.2 (Jicarilla Apache Tribe imposed tax on leasehold and other possessory interests); *Kerr-McGee Corp.*, 471 U.S. at 197 (upholding Navajo Tribe's tax of three percent on the value of leasehold interests on the reservation); Barta v. Oglala Sioux Tribe, 259 F.2d 553, 556 (8th Cir. 1958) (upholding Oglala Sioux Tribe's imposition of a "license tax" on nonmember lessors of tribal land).

128. *See generally, e.g.*, Reservation Tel. Coop. v. Three Affiliated Tribes of the Fort Berthold Reservation, 76 F.3d 181 (8th Cir. 1996) (tribe imposes possessory interest tax on right-of-way across reservation lands for telephone lines); Burlington Northern R.R. v. Blackfeet Tribe of Blackfeet Indian Reservation, 924 F.2d 899 (9th Cir. 1991) (upholding possessory interest tax on easements granted to railroad across reservation lands).

129. *See, e.g.*, *Colville*, 447 U.S. at 145.

130. *Id.*

131. *Id.* at 158.

132. *Id.* at 158-59.

nonmembers.[133] The Court's decision in *Colville*, and its decision in *Montana* one year later, sharply curtailed tribal powers to raise money by taxing transactions involving nonmembers on reservation land.

D. *Taxing Nonmembers After* Montana *and* Colville

After the *Montana* framework was announced, the Court's decision in *Merrion v. Jicarria Apache Tribe*[134] suggested that certain tribal taxation powers remained intact, at least on reservation land. *Merrion* upheld a severance tax that the tribe imposed on nonmembers who had entered into mineral leases with the tribe on reservation land.[135] The Court affirmed that "[t]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management."[136] However, the power was not described as unlimited. Tribes may tax nonmembers "only to the extent the nonmember enjoys the privilege of trade or other activity on the reservation to which the tribe can attach a tax. . . . the limited authority that a tribe may exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction."[137] In *Merrion*, the Court stated that the potential for the tribe to abuse its taxation powers was limited by the requirement that the Secretary of the Interior approve any taxes before they were imposed.[138] In spite of this apparent skepticism about increasing tribal tax power, *Merrion* is primarily significant because it makes clear that some degree of taxation power over nonmembers on reservation land survived the *Montana* decision. In light of the Court's later opinion in *Atkinson Trading Co.*, discussed below, *Merrion* appears to stand for the proposition that tribes retain broad sovereign taxation powers on tribal land.[139] The factors considered in *Merrion*, therefore, may have little relevance to determining whether tribes have the power to tax nonmember activity on fee land rather than reservation land.

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133. *Id.*

134. 455 U.S. 130 (1982).

135. *Id.* at 135. The opinion discussed at length the manner in which the tax provision had been passed. The Tribe's Constitution, which was passed pursuant to the Indian Reorganization Act with the approval of the Secretary of the Interior, permitted the Tribal Council to impose taxes on nonmembers with the Secretary's approval. The provision challenged in the case had been passed as required by the Constitution. *See id.* at 134-36.

136. *Id.* at 137; *see also* Barta v. Oglala Sioux Tribe, 259 F.2d 555, 556 (8th Cir. 1958).

137. *Merrion*, 455 U.S. at 141-42.

138. General Allotment Act of 1887, § 5, 24 Stat. 389-90.

139. *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 653 (2001) ("*Merrion*, however, was careful to note that an Indian tribe's inherent power to tax only extended to 'transactions occurring on *trust lands* and significantly involving a tribe or its members.'" (citations omitted)).

It is noteworthy that tribal interests played a role in *Merrion*. The Court rejected the proposition that tribal taxation powers derive from the tribe's power to exclude, finding that the power derives instead "from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction."[140] These interests are "strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services."[141] Significant tribal interests were implicated in *Merrion* because the tribe provided police and other government services, as well as "the advantages of a civilized society."[142] These interests were not weakened by the tribe's receipt of royalty payments from the taxed entities, because a tribe's status as a sovereign entity is distinct from its status as a business partner.[143]

This focus on value-added in *Merrion* was intended to distinguish the case from the situation in *Colville*, which the Court viewed as involving the marketing of a tax advantage only. The language in *Colville* exhibits a certain level of disdain for the tribe's revenue-raising tactics: "[i]t is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest."[144] This attitude may reflect in part the Court's attitude toward the cigarette business at issue in *Colville*. It may also be symptomatic of a general distrust for taxation and a belief that the right to impose taxes must be earned by the sovereign power. The Court failed, however, to explain why tax-based competition would be any less appropriate between a tribe and a state than it would be between two states, appearing to hold tribal taxation to a different and higher standard than state taxation.

In *Merrion* and *Colville*, the nonmembers' taxed activities occurred on tribal land. In contrast, in *Atkinson Trading Co.*, the Court focused on taxation of nonmember activities on fee land.[145] As discussed briefly

140. *Merrion*, 455 U.S. at 137.

141. *Id.* at 138 (citing Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 156-57 (1980)). The Court was attempting to distinguish *Merrion* from *Colville*, in which a cigarette tax imposed by the tribes on cigarette sales was found not to implicate significant tribal interests. *See Colville*, 447 U.S. at 154.

142. *Merrion*, 455 U.S. at 137-38 (citations omitted). These factors would not be adequate to give the tribe tax jurisdiction under *Atkinson Trading Co. See Atkinson Trading Co.*, 532 U.S. at 654-55.

143. *Merrion*, 455 U.S. at 145-46.

144. *Colville*, 447 U.S. at 155.

145. *Atkinson Trading Co.*, 532 U.S. at 645.

above, *Atkinson Trading Co.* struck down the imposition of the Navajo Nation's hotel occupancy tax on rooms in a nonmember-operated hotel located on fee simple land within the outer reservation boundaries. Justice Rehnquist stated that "[a]n Indian tribe's sovereign power to tax – whatever its derivation – reaches no further than tribal land," and in general would not extend to activity on fee simple land even if it were located within the reservation.[146] The opinion considered whether there was congressional authorization to overcome the presumption against taxing authority, and finding none, considered the facts under the *Montana* framework.[147] Where the incidence of the tax falls on nonmembers who are engaging in activity on non-Indian fee land, the Court said, the tribe may only impose its tax if the tax falls under one of the *Montana* exceptions.[148]

Rehnquist's application of the *Montana* analysis in *Atkinson Trading Co.* is noteworthy for its narrow interpretation of the consent exception. To fall under the consent exception, the relationship involved "must stem from commercial dealing, contracts, leases, or other arrangements."[149] The scope of the consent exception is further limited by the additional requirement that "the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself."[150] To determine whether a tax meets this requirement, it is necessary to first determine the legal incidence of the tax, and then to consider whether the requisite nexus is present.[151]

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146. *Id.* at 653.

147. *Id.* at 654.

148. *Id.*

149. *Id.* at 655 (quoting Montana v. United States, 450 U.S. 544, 565 (1981)).

150. *Atkinson Trading Co.*, 532 U.S. at 656. The opinion provided little guidance for how this test should be applied when there are several potential consensual relationships. In *Atkinson Trading Co.* there were arguably consensual relationships between the hotel guests and the hotel; the guests and the Navajo Nation; and the hotel and the Navajo Nation. The Court stated that the relationship between the hotel and the Navajo Nation is irrelevant because the legal incidence of the tax falls on the guests. *Id.* at 655 n.6. Some additional guidance is provided in the warning that "[a] nonmember's consensual relationship in one area . . . does not trigger tribal civil authority in another -- it is not 'in for a penny, in for a Pound.'" *Id.* at 656 (citations omitted). An argument that the tax meets this test might go as follows: guests stay at the hotel because they have chosen to travel through Indian Country, establishing a consensual relationship with the tribe. The tribe imposes the hotel occupancy tax on the basis of this relationship; thus, a nexus exists between the consensual relationship and the tax. Because the opinion largely ignores the relationship between the guests and the Navajo Nation, it neglects to explain why the relationship between the guest and the Navajo Nation cannot support the tax.

151. *See id.* at 655 n.6. The *Merrion* Court hinted at a nexus requirement. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141-42 (1981) ("a tribe has the power to tax nonmembers only to the extent the nonmember enjoys the privilege of trade or other activity on the reservation to which the tribe can attach a tax.").

What this nexus consists of, however, is difficult to determine. The reasoning articulated in the opinion suggests that the nexus at issue is between: (1) the relationship between (a) the party on whom the legal incidence of the tax falls,[152] and (b) the tribe; and (2) the tax itself. The Court held that the legal incidence of the hotel occupancy tax was on the guests, not the hotel.[153] Strangely, however, the opinion contains little discussion of whether there is an adequate nexus between the tax and the guest-tribe relationship, except to note that the guests are nonmembers and that they can get to the hotel by driving on non-Indian rights-of-way.[154]

Instead of focusing on the nexus between the guest-tribe relationship and the tax, the opinion considers the nexus between the hotel-tribe relationship and the tax. This nexus is found inadequate to support jurisdiction, leading to the tax's invalidation. Contrary to the reasoning in *Merrion*, the Atkinson Trading Company's receipt of emergency services was not enough to put the hotel under the consent exception.[155] The hotel's status under the Indian trader statutes was also insufficient to create a consensual relationship.[156]

Atkinson Trading Co. hints at even greater limitations on tribal taxation powers. First, the Court's discussion focuses on the limitations rather than the extent of tribal powers. In *Merrion*, the basis of the tribe's powers lies in its status as a sovereign power.[157] By the time of the *Atkinson Trading Co.* decision, however, the doctrine of tribal sovereignty had been weakened in a number of non-tax cases,[158] shifting the focus from the powers vested in the tribes from before the treaty era to the limitations subsequently imposed upon them by Congress and the courts.

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152. The *Atkinson Trading Co.* opinion contained only a cursory explanation of the legal incidence of the tax. Because all of the parties on which the *Atkinson Trading Co.* tax might fall were nonmembers, the question of legal incidence might have been a less important issue than it had been in other cases and therefore may have merited less extensive discussion.

153. *Atkinson Trading Co.*, 532 U.S. at 655 n.6.

154. *Id.* at 656-57. The implication may be that if the relationship between the hotel and the Navajo Nation is inadequate, then the more tenuous relationship between the hotel guests and the Navajo Nation must certainly be inadequate. It is difficult to understand this conclusion in the absence of any analysis of the relationship between the hotel guests and the Navajo Nation. The Court's logic on this point is also inconsistent with its insistence that each consensual relationship be considered on a case-by-case, fact specific basis. *See id.* at 656 ("it is not 'in for a penny, in for a Pound'").

155. *Id.* at 655.

156. *Id.* at 657. The Indian trader statutes were held inadequate to create a consensual relationship even though they formed the basis for preemption of state taxes imposed on a registered Indian trader. Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685 (1965).

157. *See supra* text accompanying notes 135-43.

158. *See supra* text accompanying note 60.

Atkinson Trading Co. hints at additional hurdles for future tribal tax initiatives. The Court says that there must be a "substantial nexus" for the tribe to impose on-reservation taxes on non-fee land,[159] a harder test than what had been required in cases such as *Merrion*[160] and one that subtly shifts analysis of taxation powers from the doctrine of sovereignty to the fact-specific framework of *Montana*. This statement is dicta, however, and given the confusing nature of the analysis in *Atkinson Trading Co.*, it is unclear what effect this aspect of the decision could have on subsequent cases.

A comparison of *Atkinson Trading Co.* and *Merrion* suggests that land status continues to be a significant factor for determining the extent of tribal taxation powers over nonmembers. When a tribe attempts to tax nonmember activity that occurs on non-reservation land, the tax will generally be found invalid unless it has been authorized by Congress or falls under one of the *Montana* exceptions, as elaborated in *Atkinson Trading Co.* When the tax falls on nonmember activity that occurs on reservation land, courts will consider a variety of factors in determining whether the tribe has made a valid exercise of taxing authority, including whether the nonmember has entered the tribe's jurisdiction; whether the taxed activity implicates a significant tribal interest; and whether the activity involves value added on the reservation.

III. STATE TAXATION

The extent of state power to tax tribal members and lands is an important limiting factor on the ability of tribes to raise revenues and regulate through taxation. State powers *vis à vis* tribes are limited by tribal sovereign powers, sovereign immunity, and federal preemption. These doctrines create some areas of exclusive tribal jurisdiction,[161] but many

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159. The opinion reads:

> Our reference in *Merrion* to a State's ability to tax activities with which it has a substantial nexus was made in the context of describing an Indian tribe's authority over *tribal* land. Only full territorial sovereigns enjoy the "power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens," and Indian tribes "can no longer be described as sovereign in this sense."

Atkinson Trading Co., 532 U.S. at 653 n.5 (internal citations omitted).

160. The weak concept of tribal sovereignty in *Atkinson Trading Co.* is especially striking when compared against early cases such as *Buster v. Wright*, which found tribes' taxation powers to be based in their inherent sovereignty. Buster v. Wright, 135 F. 947 (8th Cir. 1905).

161. *See, e.g.*, Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue, 458 U.S. 832 (1982) (state may not tax contractors building schools on Navajo reservation); White Mountain Apache Tribe

more areas of concurrent jurisdiction where state and tribal policies may conflict and frustrate each others' regulatory and revenue-raising goals.[162]

A. *State Tax Power*

States generally have no jurisdiction to impose taxes on members with respect to their activities on tribal land.[163] In *McClanahan v. State Tax Commission of Arizona*,[164] the Court considered the validity of a state income tax levied on income earned entirely on the reservation by a tribal member living on the reservation.[165] The tax was found invalid on the grounds that "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."[166] In a later decision, the Court read this exclusion broadly, finding that the standard would apply to tribal members living anywhere in Indian Country, including on fee simple land.[167] This is different from the approach taken in cases about tribal taxation powers over nonmembers, which limit tribal jurisdiction to trust land.[168] While preemption served as the framework of analysis, rather than tribal sovereignty, *McClanahan* noted that sovereignty nonetheless remained relevant as a "backdrop" for interpreting treaties and statutes.[169] The opinion created strong immunities from state taxation that rested on

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v. Bracker, 448 U.S. 136 (1980) (state may not impose taxes on logging company that operates solely on tribal land).

162. *See, e.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (both the tribe and the state may impose severance taxes on natural resource production by nonmembers); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) (both the tribe and the state may impose cigarette taxes on sales occurring within the reservation).

163. Carleton, *supra* note 79, at 256.

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

165. *Id.* at 165-66.

166. *Id.* at 171 (internal citations omitted). In subsequent cases, *McClanahan* has been cited for the proposition that states may not tax Indian reservation lands unless Congress has granted such authority. *See, e.g.*, Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973).

167. Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 124-25 (1993). The Court remanded the case to determine "whether the relevant tribal members live in Indian Country -- whether the land is within reservation boundaries, on allotted lands, or in dependent communities." *Id.* at 126.

168. For example, under the holding in *Oklahoma Tax Commission v. Sac & Fox Nation*, the state of Arizona could not tax income earned by members of the Navajo Nation while working at the hotel operated on fee simple land by the Atkinson Trading Company. *Sac & Fox Nation*, 508 U.S. at 121-28. Under the holding in *Atkinson Trading Co.*, the tribe cannot tax the nonmembers who stay at the hotel. Thus neither the state nor the tribe may exercise its taxation powers to their full extent on fee simple land within the reservation boundaries. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 645 (2001).

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

a foundation of both federal involvement in tribal life and tribal sovereignty. Most importantly, *McClanahan* assumed that tribes as sovereign entities have an interest in freedom from state intervention.

Members retain some minimal level of immunity from state taxation when they engage in activity off of reservation land. The Supreme Court repeatedly has held that states may not impose car excise taxes on cars that belong to members who reside on reservations, even if the cars have off-reservation use.[170] These decisions have been qualified, however, by the suggestion that states might be able to impose vehicle excise taxes that are tailored to tax only off-reservation use.[171] The question has never been directly addressed, and it is noteworthy that an otherwise invalid state tax on on-reservation, member activity cannot be corrected merely by expanding the tax's scope to off-reservation activity.

In general, however, state tax immunity is lost when tribal members work or live off the reservation and when tribal enterprises operate off the reservation.[172] The Court considered the latter issue in *Mescalero Apache Tribe v. Jones*,[173] which involved sales and use taxes imposed by New Mexico on a ski resort operated by the tribe on off-reservation land that the Court treated as trust land.[174] The Court noted that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State."[175] As a general matter, the tribe's enterprise was subject to the same state taxes as nontribal enterprises.[176] The situation in *Mescalero Apache Tribe* was more complicated than the general case, however, because the ski resort had been developed under

170. *See Sac & Fox Nation*, 508 U.S. at 114; Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); Moe v. Salish and Kootenai Tribes of Flathead Reservation, 425 U.S. 463 (1976).

171. *See Sac & Fox Nation*, 508 U.S. at 127; *Colville*, 447 U.S. at 163. It is difficult to imagine how such a tax would be designed, since it would be difficult to evaluate exactly how much off-reservation use is made of any particular vehicle.

172. *See* Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995). However, there may be an exception when state taxes implicate tribal self-government, as when tribal employees who live off the reservation are taxed by the state. *See id.* at 464-65.

173. Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

174. The land was not technically held in trust, but was leased to the tribe by the federal government. *See id.* at 156 n.11.

175. *Id.* at 148. The standard was tightened in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, in which the Court noted, "our cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has 'made its intention to do so unmistakably clear.'" County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 258 (1992) (quoting Montana v. Blackfeet Tribe, 471 U.S. 759, 765 (1985)).

176. *See Jones*, 411 U.S. at 148-49.

the Indian Reorganization Act.[177] The Act exempts lands taken into trust from state taxation, but the Court found that neither the statute's plain language nor its legislative history created an exemption for income earned on non-reservation trust land.[178] Trust property and permanent improvements to trust property were exempt from state taxation, but the income earned from the property was not exempt.

States may impose taxes on land that was allotted under the General Allotment Act. In *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*,[179] the Court analyzed sections 5 and 6 of the General Allotment Act and found that the statute gave the county the authority to impose an *in rem, ad valorem* property tax on patented fee land held by members, but not an excise tax on sales of the same land.[180] The Court began with the rule that congressional authorization is necessary for a state to tax tribal lands or tribal members, and then considered how the General Allotment Act, Burke Act, and Indian Reorganization Act each affected the tax status of the land involved.[181] The Court agreed with the County that section 6 of the General Allotment Act gave it authority to tax fee-patented land, and that the Burke Act reinforced that statutory power.[182] The Court found an implicit connection between pre-allotment restrictions on alienability and pre-allotment restraints on state and local taxation, determining that Congress must have intended to make allottees subject to taxes on their land once their enjoyment of their property no longer was limited by restraints on alienation.[183] Therefore, section 5 of the General Allotment Act, which removed restraints on alienability of patented land, was read as additional evidence that allotted land was subject to state taxes.[184] Finally, the Court found that the patented land's new tax status did not change with the shift in Congress's approach to Indian affairs, as manifested by the Indian Reorganization Act, because by freezing the current state of affairs, Congress left previously allotted land

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177. *Id.* at 146.
178. *Id.* at 155, 157.
179. *Yakima Indian Nation*, 502 U.S. at 251.
180. *Id.* at 270.
181. *Id.* at 258.
182. *Id.* at 258-59.
183. *Id.* at 263-64.
184. *Yakima Indian Nation*, 502 U.S. at 263-64. This section of the *Yakima Indian Nation* opinion rested on a 1906 case, *Goudy v. Meath*, 203 U.S. 146 (1906). Citing *Goudy*, Justice Scalia explained for the majority that sections 5 and 6 would appear to be inconsistent if section 5 gave allottees the ability to alienate their land free from federal restrictions, but section 6 failed to empower the states to tax the freely-alienable, allotted land. *Yakima Indian Nation*, 502 U.S. at 263. "Thus, when § 5 rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes." *Id.*

"fully alienable by the allottees, their heirs, and assigns . . ." and thus "chose not to terminate state taxation upon those lands as well."[185]

While the specific holding of *Yakima Indian Nation* may be limited to land distributed under the General Allotment Act, the case also suggests that the validity of state taxes on land within Indian Country may depend in part on whether they assert *in rem* or *in personam* jurisdiction. The Yakima Indian Nation complained that the *in rem, ad valorem* tax would interfere with its self-determination and self-governance.[186] Justice Scalia responded that while an *in personam* tax might implicate such concerns, an *in rem* tax was less problematic.[187] Another section of the opinion notes that an *in rem* tax "creates a burden on the property alone."[188] Although technically true, this ignores the fact that the individual allottees need to make tax payments in order to prevent the state from foreclosing on their land.[189] Many allottees have lost their land because they could not pay state taxes, and the *Yakima Indian Nation* dispute entered litigation when the County began foreclosing on properties it claimed owed taxes.[190] Nonetheless, the Court held that the county's *in rem, ad valorem* property tax did not threaten self-determination and was allowed pursuant to the authority granted by the General Allotment Act.[191]

By contrast, an excise tax imposed on sales of the same lands was not "taxation of . . . land" under the Act, and therefore was not allowed.[192] Interestingly, the Court found that the *in rem* nature of the excise tax did not cure its invalidity. This is a peculiar conclusion given the significance of the *in rem/in personam* distinction with regard to the ad valorem tax; while the factor is relevant, it apparently is not determinative of whether a state tax on tribal lands intrudes impermissibly on tribal sovereignty.

As legal scholar Scott Taylor noted in his examination of the case, it was peculiar for the Supreme Court to weigh the legislative intent behind the General Allotment Act, given that the purposes of that statute have since been completely repudiated by Congress and recognized more widely as misguided policy.[193] Because the General Allotment Act aimed to eliminate the tribes' political status, its provisions showed no deference

185. *Id.* at 264.

186. *Id.* at 265.

187. *Id.* at 266. Many allottees lost their land because they could not pay state taxes. Taylor, *supra* note 15, at 68.

188. *Yakima Indian Nation*, 502 U.S. at 266.

189. *Id.*

190. Taylor, *supra* note 15, at 68. *See Yahima Indian Nation*, 502 U.S. at 256.

191. *Yakima Indian Nation*, 502 U.S. at 266.

192. *Id.* at 269-70 (quoting Indian General Allotment Act, 25 U.S.C. §§ 348-49).

193. *See* Taylor, *supra* note 15, at 83.

to tribal sovereignty.[194] With the Indian Reorganization Act, however, Congress's purposes with respect to Indian policy "[returned] to the principles of tribal self-determination and self-governance which had characterized the pre-Dawes Act era."[195] While Congress froze the status of previously-allotted lands when it passed the Indian Reorganization Act, it nonetheless changed its overall approach to Indian policy, and this change should be taken into consideration when determining the effect of the Indian Reorganization Act on allotted lands.[196] Congress's unwillingness to undertake the practical difficulties of undoing allotments made over several decades does not also indicate an unwillingness to make the more easily administrable shift to pre-allotment tax status for allotted lands.[197]

Another criticism of *Yakima Indian Nation* is that it fails to distinguish between allotted lands held by individual Indians and lands held by tribes.[198] As Taylor has explained, the General Allotment Act failed to distinguish between these two types of ownership because Congress anticipated that the tribes soon would cease to exist as political entities.[199] Because this policy was eliminated with the Indian Reorganization Act, any residual effect of the General Allotment Act on tax power over allotted lands should be limited to land held by individuals in order to prevent encroachment on tribal sovereignty by permitting state taxation of tribal lands.[200]

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194. *See id.*

195. *Yakima Indian Nation*, 502 U.S. at 255.

196. *See* Taylor, *supra* note 15, at 83.

197. The *Yakima Indian Nation* opinion suggested that it would be very difficult to administer a tax only on land held in fee simple by nonmembers. The Court used this point to bolster its argument in favor of applying the tax to all fee-patented land regardless of ownership. *Yakima Indian Nation*, 502 U.S. at 265. The Court suggests that determining whether someone who owns fee-patented land is a member of the tribe would be more challenging than "tak[ing] account of immunities or exemptions enjoyed, for example, by federally owned, state owned, and church-owned lands." *Id.* It is not clear why the tax assessor's job under the Yakima Indian Nation's proposed regime would be so much more complicated, nor is it obvious why the difference in administrability should influence the extent of state power over tribal members.

198. *See* Taylor, *supra* note 15, at 83. The cases discussed in this Article that challenge state taxes imposed against tribal businesses were initiated by the tribes. *See* Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 453 (1995); *Yakima Indian Nation*, 502 U.S. at 256. However, *Yakima Indian Nation* indicates that prior to the tribe's filing, the county had begun to foreclose on properties owned by the tribe. *See id.*

199. Taylor, *supra* note 15, at 83.

200. *See id.* at 83-84. The Court will have the opportunity to address state tax authority over certain categories of tribal land when it hears *Oneida Indian Nation v. Sherrill*, 124 S. Ct. 2904 (2004), *cert. granted.* The case involves a property tax imposed by the City of Sherrill, New York on land that the Oneida Indian Nation bought in the 1990s. Oneida Indian Nation v. Sherrill, 337 F.3d 139, 144 (2d Cir. 2003). The land had been designated reservation land by the 1794 Treaty

Sovereign immunity may provide an additional protection to tribes, although it is unclear whether tribal landholdings would be sheltered from *in rem* actions to collect taxes. The discussion in *Yakima Indian Nation* suggests that *in rem* actions against property within the reservation do not generally implicate tribal sovereignty to the same extent as actions *in personam*, suggesting that perhaps tribal sovereign immunity might also be weaker for *in rem* actions. Sovereignty and sovereign immunity are distinct issues, however, and the Court's Eleventh Amendment decisions on *in rem* jurisdiction lend some support to the contention that sovereign immunity should be extended to *in rem* actions against property held by tribes.[201]

B. *Legal Incidence Versus Economic Burden*

The concept of legal incidence attempts to capture who pays a tax for purposes of determining the tax's jurisdictional implications. A key issue in both state taxation of Indian and tribal interests and tribal taxation of nonmembers is determining whether the legal incidence of a tax falls on individual Indians or tribes, or whether it falls elsewhere. The state may not tax "reservation land or reservation Indians" in the absence of clear federal authorization, so the legal incidence determination may be dispositive as to whether a state tax is valid.[202] It also may be dispositive as to the validity of a tribal tax, because while tribes have full power to impose taxes on member activity on the reservation, they may only impose

of Canandaigua, but was illegally sold without federal approval in the first decade of the nineteenth century. *Id.* The Second Circuit found that the land is reservation land and that the state lacked authority to tax the land. *Id.* at 167.

201. The Court's Eleventh Amendment decisions on *in rem* jurisdiction are discussed in RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1036, 982 n.7 (5th ed. 2003). In *Florida Department of State v. Treasure Salvors, Inc.*, the Court held that the federal district court could not "adjudicate the State's interest in the [contested] property without the State's consent." Fla. Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 682 (1992). However, the Court also found that a suit against the officers, who lacked "colorable basis on which to retain possession" of the property, was valid. *Id.* In *Gardner v. New Jersey*, the Court found that there was no "prohibited suit against the State" when a reorganization court in a bankruptcy action heard the trustee's petition asking for adjudication of disputed tax liabilities after the state had filed a claim for taxes owed. Gardner v. New Jersey, 329 U.S. 565, 571 (1947). The holding was limited in *College Savings Bank v. Florida Prepaid Postseconday Educational Expense Board*, to stand for the proposition "that a state waives its sovereign immunity by voluntarily invoking the jurisdiction of the federal courts." Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 681, n.3 (1999); *see also* FALLON ET AL., *supra*, at 982 n.7.

202. *See Chickasaw Nation*, 515 U.S. at 458 (quoting *Yakima Indian Nation*, 502 U.S. at 258).

taxes on nonmember activity on fee land if authorized by congressional statute or if one of the *Montana* exceptions applies.[203]

As a preliminary matter, it may be helpful to consider the ways in which taxation constitutes an exercise of sovereign power over different economic actors. Taxation is an exercise of jurisdictional authority over certain persons and entities who are required to pay money to the state. Taxes affect purchaser welfare, because once a tax is imposed, purchasers either pay more or purchase less, or some combination of the two. Sellers may collect less of a profit on each sale, complete fewer sales overall, or even conduct fewer transactions at lower prices. The key determinants of who pays more and earns less are the elasticities of supply and demand, regardless of who the law holds criminally or civilly liable for nonpayment.

The imposition of tax liability also has effects beyond those parties whose economic interactions are directly affected. For example, tax provisions may impose incidental burdens in the form of transaction costs, such as collection and reporting responsibilities. These costs can be viewed as an exercise of jurisdiction over the parties who are required to pay them.

Taxes are also a more general expression of the sovereign will. The revenue raised by taxes supports government's basic existence and facilitates the exercise of sovereign power. Taxes may be imposed to pull resources from one sector of the economy and move them to another, or to support high priority governmental programs. Revenue measures may be designed to attract investment to a specific segment of the economy or to the economy as a whole. Conversely, revenue measures may be shaped to dissuade consumer spending on particular kinds of items or to limit investment in particular sectors.

Because sovereignty is so strongly and intricately linked with the power to tax, only a nuanced legal doctrine can effectively capture the impact of state taxes on tribal sovereignty. Ideally, the operative test of a tax's incidence would roughly approximate economic burden, and Courts would consider how state and tribal taxes actually impact tribal consumers, retailers, and the effectiveness of tribal economic policy. In fact, the Court has developed a legal incidence test that is highly textual and gives greater weight to statutory construction than to economic reality, permitting states to impose their revenue measures in a manner that impedes tribal autonomy.

203. Interestingly, the legal incidence of a tax does not appear to affect a plaintiff's standing to challenge the tax. *See, e.g.*, Atkinson Trading Co. v. Shirley, 532 U.S. 645, 654 n.6 (2001) (legal incidence of tax is on hotel guests rather than petitioner).

The Supreme Court has found that the legal incidence of a tax falls on non-Indians even when there is a strong argument that tribes or individual Indians are economically burdened.[204] Legal incidence is an absolute concept that presumes that the tax falls all on one party, failing to capture the broad impact state taxes have on both nonmembers and members, consumers and retailers. Justice Ginsburg has argued that a legal incidence test provides greater certainty to the states,[205] but the manner in which it is applied keeps tribes guessing about the reach of their taxation powers. This section will consider how the Court has approached the legal incidence analysis in three cases: *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*,[206] *Washington v. Confederated Tribes of the Colville Indian Reservation*,[207] and *Oklahoma Tax Commission v. Chickasaw Nation*.[208]

1. Defining and Applying Legal Incidence

An early example of legal incidence analysis can be found in *Moe v. Confederated Salish and Kootenai Tribes*.[209] *Moe* examined the validity of a number of state taxes that had been imposed on tribal members. The Court cited the Supremacy Clause to invalidate a tax on personal property located within the reservation, a vendor license fee applied to a tribal member selling cigarettes for the tribes on tribal land, and a cigarette tax applied to sales between Indians.[210] It refused, however, to invalidate a state cigarette tax imposed on sales by the Indian retailer to non-Indian consumers, concluding that the legal incidence of the tax fell on the non-Indians and therefore was permissible.

The Court focused its tax incidence analysis on the language of the statute and criminal liability for nonpayment. The statute's plain language stated that the tax was imposed on consumers, not retailers: "the cigarette tax 'shall be conclusively presumed to be [a] direct [tax] on the retail consumer precollected for the purpose of convenience and facility only.'"[211] The provision also made it a misdemeanor for a retail purchaser to fail to pay the tax altogether.[212] In theory, the purchaser could avoid criminal liability by paying the tax directly to the state after purchase, rather than

204. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).
205. *See* Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 460 (1995).
206. 425 U.S. 463 (1976).
207. 447 U.S. 134 (1979).
208. *Chickasaw Nation*, 515 U.S. at 450.
209. *Moe*, 425 U.S. at 463.
210. *Id.* at 480-81.
211. *Id.* at 482.
212. *Id.*

through the retailer at the time of purchase.[213] The Court made the obvious prediction, however, that "[w]ithout the simple expedient of having the retailer collect the sales tax from non-Indian purchasers . . . wholesale violations of the law by the latter class will go virtually unchecked."[214]

While focusing on the consumer's liability, the Court ignored the risk of criminal prosecution faced by retailers who failed to cooperate with the tax scheme. The statute required retailers to "precollect" the cigarette tax by paying the tax themselves when they purchased the cigarettes from their suppliers.[215] The retailers faced criminal liability for failure to comply with this aspect of the tax statute.[216] In fact, the smokeshop owner whose actions were at issue in *Moe* had been arrested along with another Indian who worked at the smokeshop "for failure to possess a cigarette retailer's license and for selling nontax-stamped cigarettes, both misdemeanors under Montana law."[217]

The discussion in *Moe* fails to acknowledge the nuances of economic burden and tribal sovereignty because it treats tax incidence as an "all-or-nothing" issue. The Court notes that the state tax affects the comparative advantage of tribal retailers, but rejects the tribes' argument that the Indian retailer bears the tax, deferring instead to the District Court's finding that the consumer ultimately benefits from nonpayment.[218] The precollection requirement is not a tax at all, the Court rules, concluding that the scheme neither "frustrates tribal self-government" nor "runs afoul of any congressional enactment dealing with the affairs of reservation Indians. . . ."[219]

Moe ignores the detrimental impact of the state taxes on both on-reservation business and tribal tax power. Ordinarily, sovereign powers may decide to promote economic development by enacting tax plans that attract consumers who might otherwise bring their money elsewhere. Sovereigns also may choose to raise revenue or regulate consumption by increasing taxes on certain goods. Tribal powers are limited, however, by the requirement that tribal members comply with taxes imposed by state governments. Practically speaking, this means that tribal retail income falls and that tribal economic policy suffers. Non-Indian consumers are worse off after *Moe* because they no longer can avoid taxes by making their purchases from tribal retailers. The retailers are also worse off, however,

213. *Id.*
214. *Moe*, 425 U.S. at 482.
215. *Id.* at 468 n.6, 481.
216. *Id.* at 467.
217. *Id.*
218. *Id.* at 481.
219. *Moe*, 425 U.S. at 483.

because they lose non-Indian consumers, and *Moe* ignores this impact of taxes on tribal interests. Furthermore, *Moe* gives the states control over tribal tax power because legal incidence depends heavily on textual analysis of state statutes.

The *Moe* Court purported to base the legal incidence analysis on objective factors without considering who could bear the incidence under the law. In *Colville*, however, the analysis takes into consideration not only on whom the tax actually falls, but also on whom the law permits the tax to fall. As with *Moe*, *Colville* involved the on-reservation sale of cigarettes to nonmembers by members who were not collecting state tax. *Colville*, however, included the added dimension of a competing tribal tax on cigarettes.[220] The Court extended its reasoning from *Moe* to find that sales by tribal members to nonmembers on reservation land were not exempt from state cigarette taxes despite the tribes' revenue programs.[221]

Washington's cigarette excise tax consisted of a levy of "$1.60 per carton on the 'sale, use, consumption, handling, possession or distribution' of cigarettes within the State."[222] The state enforced the tax by affixing stamps to cigarettes and permitting only the stamped cigarettes to be sold.[223] The revenue measure included an exemption for sales by Indian tribes to tribal members.[224] In addition to the excise tax, the state also imposed its five percent sales tax on cigarettes, which the Court characterized as "collected from the purchaser by the retailer."[225] Like the excise tax, the sales tax also included an exemption for on-reservation sales to tribal members.[226]

There were four tribes involved in the *Colville* litigation, with three imposing similar taxes on cigarette sales.[227] These tribes had enacted tribal ordinances, approved by the Secretary of the Interior, that authorized certain on-reservation retailers to sell tobacco.[228]

> All three Tribes distribute the cigarettes to the tobacco outlets and collect from the operators of those outlets both the wholesale

220. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 151 (1980). The tax at issue in *Colville* also imposed a recording burden on the member retailers in addition to the burden of collecting the tax. *Id.*

221. *Id.* at 161.

222. *Id.* at 141 (citing WASH. REV. CODE § 82.24.020 (1976)).

223. *Id.*

224. *Id.*

225. *Colville*, 447 U.S. at 142.

226. The Court stated that the sales tax "does not apply to on-reservation sales to reservation Indians." *Id.*

227. *Id.* at 144.

228. *Id.* The retailers were also federally-licensed Indian traders. *Id.*

> distribution price and a tax of forty to fifty cents per carton. The cigarettes remain the property of the Tribe until sale. *The taxing ordinances specify that the tax is to be passed on to the ultimate consumer of the cigarettes.*[229]

The Court determined on the basis of this language that the incidence of the Colville, Lummi and Makah taxes was on the consumer, not the retailer.[230]

The fourth tribe involved in the case, the Yakima Tribe, bought cigarettes at wholesale and then sold them to licensed retailers, collecting a markup and a tax of 22.5¢ per carton.[231] The Court specified that the Yakima ordinance did not require that this tax be added to the selling price, and therefore concluded that the tax fell on the retailer.[232]

Thus the incidence of the tribal taxes was determined through a close reading of the statutory language, as legal incidence had been determined in *Moe*. This analysis in *Colville* suffered from the same basic failings as the reasoning in *Moe*. Once again, the Court failed to construct a legal incidence test that might approximate economic burden or meaningfully gauge the significance of tribal taxing powers to tribal sovereignty. Thus, although the Court upheld the tribes' power to impose tribal taxes on nonmember purchasers, it undercut its own ruling by also requiring nonmember consumers to pay state taxes.

In addition, there is an internal inconsistency in the Court's analysis of legal incidence in *Colville*, because the state tax is considered in a different manner from how the tribal taxes are considered. Instead of conducting its own analysis of legal incidence of the state tax, the Court relied on the district court's finding that the cigarette excise tax falls on the purchaser.[233] It also adopted the district court's circular reasoning that "the tax falls upon the first event which may constitutionally be subjected to it."[234] In other words, if the true legal incidence of the tax is on an Indian who cannot be taxed by the state, then the legal incidence will be shifted to the next party down the chain of commerce on whom the tax may be imposed. Thus, "where the wholesaler or retailer is an Indian on whom the tax cannot be imposed under *McClanahan* . . ., the first taxable event is the

229. *Id.*

230. *Colville*, 447 U.S. at 152 n.28.

231. *Id.* at 144-45. The Court suggested that the markup collected by the Yakima Tribe distinguished its cigarette sales scheme from those of the Colville, Lummi, and Makah tribes. The Court suggested that these three tribes acted as retailers rather than as wholesalers. *Id.*

232. *Id.* at 145, 152 n.28.

233. *Id.* at 142.

234. *Id.* n.9.

use, consumption, or possession by the non-Indian purchaser."[235] Accordingly, the Court determined that the state taxes could be imposed on nonmember purchasers, even though the tribal retailers and wholesalers were economically burdened by the tax. The "first taxable event" test ignores the true economic burden altogether.

The Court returned to a *Moe*-like legal incidence analysis in *Oklahoma Tax Commission v. Chickasaw Nation*,[236] which struck down an excise tax that Oklahoma had imposed on fuel sold on the reservation by Chickasaw Nation retailers to both members and nonmembers.[237] The test set forth in Justice Ginsburg's opinion was intended to determine whether a state tax had been levied "directly on an Indian tribe or its members inside Indian Country, rather than on non-Indians."[238] If the tax fell on non-Indians, then the Court would balance federal, state, and tribal interests to determine whether the tax was permissible.[239] If the tax fell on the tribe or its members, however, then the tax would be invalidated in the absence of cession of jurisdiction or an authorizing federal statute.[240]

Justice Ginsburg's opinion first asked whether the statute expressly stated who would bear the legal incidence of the tax.[241] A related question was whether the statute contained a "'pass through' provision, requiring distributors and retailers to pass on the tax's cost to consumers," which would indicate that the legal incidence fell on the consumers.[242] In the case of the Oklahoma statute, however, Justice Ginsburg found that the statute's plain language did not determine its legal incidence.

When the statute fails to provide explicit guidance, then "the question is one of 'fair interpretation of the taxing statute as written and applied.'"[243] A number of factors indicated that the legal incidence of the Oklahoma tax fell on retailers, rather than distributors or customers. Oklahoma law stated that fuel distributors must "remit" the tax "on behalf of a licensed retailer," suggesting that the tax itself falls on the retailer rather than the distributor.[244] The tax was imposed on sales from

235. *Colville*, 447 U.S. at 142 n.9 (full citation omitted).

236. 515 U.S. 450 (1995).

237. *Id.* at 453.

238. *Id.* at 458.

239. *Id.*

240. *Id.*

241. *Chickasaw Nation*, 515 U.S. at 461.

242. *Id.* Justice Ginsburg quoted the statute in *Moe*, which said that the tax "shall be conclusively presumed to be [a] direct [tax] on the retail consumer precollected for the purpose of convenience and facility only." *Id.* (quoting Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 482 (1976)).

243. *Id.* (internal quotations omitted).

244. *Id.* (citing OKLA. STAT. tit. 68, § 505(c) (1991)).

distributors to retailers, but not on sales between distributors.[245] Distributors who were unable to collect prepaid taxes from their retailers could subtract the uncollected amount from future payments to the state.[246] Oklahoma permitted distributors to retain a portion of the tax collected, indicating that the distributor was acting as an agent on behalf of the state.[247] The Court noted that the tax provision contained no indication that the retailers might be acting as collection agents *vis à vis* consumers, and that liability for nonpayment rested on distributors and retailers, but not on consumers.[248]

The approach outlined in *Chickasaw Nation* is primarily textual, and Justice Ginsburg notes that Oklahoma could bring its tax provision into compliance with the opinion merely by amending the law to state explicitly that the legal incidence falls on nonmember consumers.[249] This approach oversimplifies tribal rights to be free from state taxation by turning the question into one of statutory drafting. At the same time, however, it provides clear guidance as to the language tribal governments should push to have included in state tax provisions so as to maintain the tax advantages for tribal businesses. Of course, having a textually-based test also makes it easier for non-tribal retailers to lobby for language that will prevent any tax advantage from accruing to competing tribal retailers.

It is unclear whether the objective factor approach outlined in *Chickasaw* replaces the circular first taxable event test. The *Chickasaw* Court did not explicitly overrule *Colville*, but distinguished the case on the grounds that *Colville* dealt with state taxation of non-Indians, whereas *Chickasaw* involved a state tax on Indians.[250] Presumably, however, the *Chickasaw* approach will be applied in the future when the Court makes legal incidence determinations.

2. The Economic Burden Alternative to the Legal Incidence Test

Prior to adopting and defining the legal incidence test, the Court flirted with an economic burden test to determine the validity of state taxes on tribal retailers who conducted transactions with nonmembers at on-reservation stores. In *Warren Trading Post Co. v. Arizona Tax Commission*,[251] the Court considered the burden of a state tax on income

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245. *Id.*

246. *Chickasaw Nation*, 515 U.S. at 461.

247. *Id.* at 462.

248. *Id.*

249. *Id.* at 460. In fact, the Oklahoma legislature tried, but failed to enact such a provision prior to the *Chickasaw Nation* decision. *Id.* at 460 n.10.

250. *Id.* at 459 n.8.

251. 380 U.S. 685 (1965).

earned by a licensed Indian trader selling goods to Indians on reservation land.[252] The Court held the Arizona tax invalid to the extent that it was "applied to this federally licensed Indian trader with respect to sales made to reservation Indians on the reservation," because this would impose a burden on Indian traders that would interfere with the congressional purpose of "protect[ing] Indians against prices deemed unfair or unreasonable."[253] While the statutory language focused on the Indian trader, the Court nonetheless saw a threat that Indian customers would ultimately bear the burden of the tax, and invalidated the tax on that ground.[254]

Economic burden formed the basis of analysis in two other cases striking down state taxes that were imposed on nonmember, on-reservation activity. In *White Mountain Apache Tribe v. Bracker*,[255] the Court conducted a preemption analysis to conclude that the state could not impose a motor carrier license tax or use fuel tax on a corporation operating only on the reservation.[256] The Court did not discuss the legal incidence of the tax, but it did note that the economic burden of the tax fell on the tribe and suggested that this was a relevant factor in the preemption analysis.[257] The Court cited this decision in *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*[258] when it rejected the state's suggestion that the legal incidence test be applied.[259] Justice Marshall's majority opinion noted that a tax's legal incidence might sometimes be significant in determining whether or not it is valid. Even though the test would have weighed in favor of the state, "[g]iven the comprehensive federal regulatory scheme at issue . . .," the Court "decline[d] to allow the State to impose additional burdens on the significant federal interest . . . even if those burdens are imposed indirectly through a tax on a non-Indian contractor for work done on the reservation."[260]

The economic burden analysis is sensible because it focuses on how taxes affect both individual Indians and broader tribal interests. It provides a more nuanced examination of how taxes affect interactions between businesses, consumers, and the sovereign power. This is because it recognizes that neither statutory language nor criminal liability will

252. *Id.* at 685-86.
253. *Id.* at 691-92.
254. *Id.* The tax was imposed on two percent of "gross proceeds of sales, or gross income" of the trading post. *Id.* at 685.
255. 448 U.S. 136 (1980).
256. *Id.* at 138.
257. *Id.* at 151 n.15.
258. 458 U.S. 832 (1982).
259. *Id.* at 844 n.8.
260. *Id.*

necessarily reflect the true impact of taxation, and it permits courts to consider how a single tax can impact multiple economic actors through both price and sales volume.

Economic burden analysis also encompasses the idea that a tax may impact general business decisions that ultimately affect tribal welfare. For example, in *Warren Trading Post*, the Court's preemption analysis regarding the Indian trader statutes reflects a general concern about the impact of the state tax on the federal government's ability to protect Indians from economic exploitation.[261] If the government's ability to meet these obligations were weakened, then economic welfare would suffer generally, regardless of the technical legal incidence of the tax in any particular case.

One drawback of an economic burden test is that its flexibility may result in selective consideration of a tax's effects. For example, *Cotton Petroleum Corp. v. New Mexico*[262] addressed the question of whether the state could impose a severance tax on a company that had entered into mineral and gas leases with the tribe.[263] If such a tax raises costs so that oil and gas production on the reservation is no longer profitable, or is less profitable than it would be at alternative sites, then the company will choose to reduce its on-reservation operations. This reduction would hurt the tribe's economic interests by reducing jobs, investment in tribal infrastructure, and tribal tax revenues. Thus the burden of the tax may fall on both the non-Indian companies and the tribe. It need not fall entirely on one or the other.

The *Cotton Petroleum* opinion did not address the legal incidence of the tax, but to distinguish the case from two earlier cases in which state taxes had been found invalid, it cited the district court's finding that the severance tax imposed no economic burden on the tribe.[264] As further evidence that the burden fell on non-Indians, the Court cited the fact that *amicus* briefs had been filed by a number of oil and gas companies.[265] There is language in the opinion recognizing that the tax imposes some burden on tribal revenues, but these effects are disregarded in the final analysis.[266] The Court considered unimportant the possibility that the state

261. *See* Warren Trading Post v. Arizona State Comm'n, 380 U.S. 685, 690-92 (1965).

262. 490 U.S. 163 (1989).

263. *Id.* at 166.

264. *Id.* at 185.

265. *Id.* at 187 n.18.

266. The Court stated that, while it agreed with Cotton Petroleum "that a purpose of the 1938 [Indian Mineral Leasing] Act is to provide Indian tribes with badly needed revenue," it found "no evidence for the further supposition that Congress intended to remove all barriers to profit maximization," such as state taxation. *Id.* at 180. The opinion also notes, however, that Cotton

severance tax might reduce income for both the companies and the tribe by raising the cost of mineral exploitation on the reservation. Despite the nature of the consideration of economic burden in *Cotton Petroleum*, however, a formal economic burden test could leave room to consider burdens on multiple parties, and thus could be fairer than a legal incidence test.

Justice Ginsburg questioned the usefulness of economic burden analysis in her *Chickasaw* opinion, stating that "[t]he factors that would enter into an inquiry . . . are daunting."[267] She argued that legal incidence provides a more predictable test that improves the administrability of state tax programs, even if it fails to accommodate the full scope of the effects that taxes can have.[268] It is undoubtedly easier for states to predict their revenues if they can draft their own tax authority into their statutes. However, the text-based legal incidence test ignores the complex balance between federal, state, and tribal powers and abdicates the Court's authority over the daunting task of preserving tribal rights. While it would be complicated for the Court to make determinations about "how completely retailers can pass along tax increases without sacrificing sales volume,"[269] the Court could rely on fact finding by district courts, as it has with regard to legal incidence in *Moe* and *Colville*. An economic burden test would provide the flexibility necessary to rule on the validity of state and tribal taxes in a manner that preserves tribal powers.

It perhaps is not surprising that the Court has abandoned the economic burden test in favor of the legal incidence test, because the shift shadows the general trend of reigning in tribal authority. Legal incidence analysis gives states almost complete control over whether their revenue measures apply on reservation land, since the validity of state tax provisions is determined on the basis of statutory language rather than economic impact. Accordingly, tribes have a more difficult time implementing fiscal policy to steer economic development and raise revenue to fund governmental operations.

Petroleum was not "a case in which an unusually large state tax has imposed a substantial burden on the Tribe." *Id.* at 186.

267. Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 460 (1995). The opinion continues: "If we were to make 'economic reality' our guide, we might be obliged to consider, for example, how completely retailers can pass along tax increases without sacrificing sales volume -- a complicated matter dependent on the characteristics of the market for the relevant product." *Id.*

268. *Id.*

269. *Id.*

IV. RECLAIMING TAXATION POWERS

This patchwork of Supreme Court decisions leaves many unanswered questions about the extent of tribal taxation powers. Tribes' sovereign powers to tax have been significantly curtailed by opinions that broadly interpret state jurisdiction and narrowly interpret tribal jurisdiction. While some of the new limitations are clearly stated, the extent to which tribes may tax nonmembers remains poorly defined.

Tribal policymakers must consider two questions in particular when designing new tax programs. First, they must consider whether the tax can be designed to preempt competing taxes imposed by the state. Preemption remains crucial to maintaining a tax's effectiveness within the reservation. The second question is whether the tax falls under one of the *Montana* exceptions, since the *Montana* framework will determine the legitimacy of tribal taxes on nonmembers on fee simple land.[270] Although the exceptions have been applied somewhat inconsistently from case to case, there nonetheless are certain guidelines about what constitutes consent and what implicates a tribe's political integrity, economic security, health or welfare. The first and second questions are closely related because some factors that are relevant to preemption analysis are related to tribal self-governance and may therefore bring the tax under the second *Montana* exception.

A. *Preemption*

Preemption in Indian law cases is different from ordinary preemption and is determined in a flexible, fact-specific manner.[271] The Court considers tribal interests in addition to federal and state interests, as well as the "broad policies that underlie the legislation and the history of tribal independence in the field at issue."[272] Federal preemption of state taxes need not be express, and all statutory ambiguities are resolved in favor of the tribes.[273] The test's malleability has resulted in standards that are difficult to satisfy in practice. Statutes and treaties dealing generally with self-governance and economic development are not enough to preempt state taxes.[274] Even when federal statutes specifically address state taxation

270. *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 654 (2001).

271. *Cotton Petroleum*, 490 U.S. at 176.

272. *Id.*

273. *Id.* at 176-77.

274. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155 (1980) (rejecting tribe's preemption arguments with respect to the Indian Reorganization Act of 1934, the Indian Self-Determination and Education Assistance Act of 1975, Indian trader statutes, and a number of treaties).

of tribal interests, the Court has been reluctant to find preemption in the absence of evidence that the statute specifically anticipated a particular tax provision.[275]

Several pre-*Atkinson Trading Co.* cases held state taxes invalid on preemption grounds. In *Warren Trading Post*, the Court held that federal Indian trader statutes preempted the imposition of a state sales tax on a licensed Indian trader located on the reservation whose customers were tribal members.[276] Although the holding with respect to the Indian trader regulatory scheme has been limited by subsequent decisions,[277] the case sets forth a list of factors that are relevant to preemption analysis. The long history of the Indian trader statutes is deemed significant, as is the exclusivity and breadth of powers granted to the Commissioner of Indian Affairs.[278] The Court also considers the Commissioner's promulgation of extensive regulations "prescribing in the most minute fashion" licensing requirements and procedures, punishments for unlicensed trading, and what traders may sell to Indians, in addition to disallowing certain conduct at trading posts.[279]

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275. *See id.* at 156 (the intent of the Washington Enabling Act that the state would not tax reservation land or income derived from reservation lands does not preempt state taxes "assessed against nonmembers of the Tribes [that] concern transactions in personalty with no substantial connection to reservation lands.").

276. Warren Trading Post Co. v. Ariz. State Tax Comm'n, 380 U.S. 685, 691 (1965).

277. *Atkinson Trading Co.* held that "'Indian trader' status by itself cannot support the imposition of the hotel occupancy tax" on nonmember guests of a hotel situated on non-fee land. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 656 (2001). Similarly, in *Department of Taxation and Finance v. Milhelm Attea & Bros., Inc.*, the Court upheld a state scheme limiting the number of unstamped cigarettes that wholesalers could sell to Indian retailers, noting that the Indian trader statutes did not preempt the state-imposed quotas. Dep't of Taxation & Fin. v. Milhelm Attea & Bros. Inc., 512 U.S. 61, 70-71 (1994).

278. *Warren Trading Post Co.*, 380 U.S. at 687-89. The first Indian trader statute passed in 1790 and required that Indian traders be licensed by the federal government. An 1876 statute (Federal Indian Law 94-138, 373-381) gives the Commissioner of Indian Affairs the "'sole power and authority to appoint traders to the Indian tribes.'" *Id.* at 688-89 (quoting 25 U.S.C. § 261 (1958)). In addition, the Commissioner has the sole power and authority to determine "the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." *Id.* (quoting 25 U.S.C. § 261 (1958)).

279. *Id.* at 689. Additional regulations dictate how traders must maintain their business records, which federal inspectors may examine "to make sure that prices charged are fair and reasonable." *Id.* (citations omitted). Traders are required to pay Indians with money. *Id.* Further, they are required to execute bond when applying for licenses. *Id.* Finally, regulations permit "the governing body of an Indian reservation [to] assess from a trader 'such fees, etc., as it may deem appropriate.'" *Id.*

The Court once again used preemption to invalidate state taxes in *White Mountain Apache Tribe v. Bracker*,[280] finding that state taxes on non-tribal corporations conducting business solely on tribal land were preempted by federal legislation in the area of timber management and by Bureau of Indian Affairs (BIA) management efforts.[281] As with *Warren Trading Post*, the *Bracker* holding has been limited to the facts of the case by subsequent opinions,[282] but the Court's reasoning points to a set of relevant factors that are similar to those discussed in *Warren Trading Post*. The opinion relied on the "comprehensive" nature of federal regulation of on-reservation timber harvesting, including legislative enactments, administrative regulations, and the "day-to-day supervision" of the BIA.[283] As in *Warren Trading Post*, the breadth of government officials' power was considered significant.[284] The state did not have regulatory interests justifying intervention, because the taxed activity took place solely on the reservation using BIA roads.[285] While acknowledging that the state had a "generalized interest in raising revenue," the Court determined that this was not enough to justify the tax.[286]

280. 448 U.S. 136 (1980). A few years earlier, in *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976), the Court struck down Montana's "personal property tax on personal property located within the reservation[,] ... vendor license fee sought to be applied to a reservation Indian conducting a cigarette business for the Tribe on reservation land[,] and . . . cigarette sales tax, as applied to on-reservation sales by Indians to Indians, . . ." on the grounds that they "conflict[ed] with the congressional statutes which provide the basis for decision with respect to such impositions." *Id.* at 480-81 (citations omitted). Although this analysis hinted at preemption, the Court actually cited the Supremacy Clause rather than preemption as the source of the invalidation. *Id.* at 481 n.17.

281. *Bracker*, 448 U.S. at 138.

282. *See, e.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 183-84 (1989).

283. *Bracker*, 448 U.S. at 145.

284. The Court noted that the Secretary has "broad authority" over reservation timber sales and revenue. *Id.* Furthermore, the Court stated:

> Timber on Indian land may be sold only with the consent of the Secretary, and the proceeds from any such sales, less administrative expenses incurred by the Federal Government, are to be used for the benefit of the Indians or transferred to the Indian owner. Sales of timber must "be based upon a consideration of the needs and best interests of the Indian owner and his heirs." 25 U.S.C. § 406(a). The statute specifies the factors which the Secretary must consider in making that determination . . . . He is authorized to promulgate regulations for the operation and management of Indian forestry units." 25 U.S.C. § 466.

Id. at 146.

285. *Id.* at 148-50.

286. *Id.* at 150. *See also* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 336 (1983) ("a state seeking to impose a tax on a transaction between a Tribe and nonmembers must point to more than its general interest in raising revenues").

Two years after the *Bracker* decision, the Court looked at similar factors to find a state tax preempted as applied to a construction company building an on-reservation school in *Ramah Navajo School Board, Inc. v. Board of Revenue*.[287] The opinion described the "[f]ederal regulation of the construction and financing of Indian educational institutions . . ." as "both comprehensive and pervasive."[288] The history of the program was taken into consideration, and the Court noted that from the first treaties between the United States and the Navajo Nation, education of Navajo children has been a federal concern.[289] The Court also cited a number of federal statutes pertaining to federal supervision of education of Indian children, including the Self-Determination Act.[290]

While inquiries in future preemption cases will be fact-specific, *Bracker* and *Ramah Navajo School Board* suggest a set of factors that are likely to be considered with some consistency. Preemption is more likely to be found where there is a history of federal involvement both by Congress and by the executive branch; where the extent of authorized executive involvement is broad; and where executive agencies have exercised their authority extensively. Competing state interests may also be included in the analysis. Where the regulated activity has weak off-reservation effects, state interests will not weigh heavily against competing interests of the federal and tribal governments.[291] Specific statutory language is likely to be a component of the analysis.[292]

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287. 458 U.S. 832 (1982).

288. *Id.* at 839.

289. *Id.*

290. *See id.* at 840. The Self-Determination Act was held relevant because of its specific reference to education. *See id.*

291. For example, in *New Mexico v. Mescalero Apache Tribe*, a non-tax case, the Court found that the tribe and federal governments' efforts to develop wildlife resources preempted state hunting and fishing regulations. *Mescalero Apache Tribe*, 462 U.S. at 344. As in *Bracker* and *Ramah School Board*, the opinion balances state, federal, and tribal interests. Because the state regulations conflicted with the tribal regulations, "concurrent jurisdiction would effectively nullify the tribe's authority to control hunting and fishing on the reservation" and also would "disturb and disarrange" the program cooperatively developed by the tribal and federal governments. *Id.* at 338 (citations omitted). Congress could not have intended for the state to have jurisdiction, since management responsibility for tribal resources had been granted to the Secretary of the Interior and to the Tribal Council by federal law. *Id.* at 340. The activity had no off-reservation effect, and the Court determined that the State provided no significant services in connection with the on-reservation activity to be taxed. *Id.* at 341-42.

292. An example is *Cabazon Band of Mission Indians v. Wilson*, holding that the state of California cannot tax offsite wagering that takes place on the reservation, because such taxes are preempted by IGRA. Cabazon Band of Mission Indians v. Wilson, 37 F.3d 430, 435 (9th Cir. 1994). The Ninth Circuit observed that the state tax revenue exceeded the plaintiff Bands' revenue, so the tax made the state the primary beneficiary of the gaming activities, violating the purposes of IGRA. *Id.* at 433.

A tribe that wishes to avert competing state taxes should keep these factors in mind when drawing up its own tax and regulatory provisions. Provisions dealing with timber, education, or other fields with a history of either extensive federal involvement or state abdication are most likely to preempt state taxes. When a tribe seeks to enact new taxes and avoid overlapping state jurisdiction, it will be most likely to succeed if it manages to pass its own provisions in conjunction with a federal statutory program that grants broad regulatory powers, including authority to issue detailed regulations on the matter. The tribe should push to have the statute include explicit language that reserves the benefits of the program to the tribe and otherwise limits state powers.

To the extent that the federal government has an interest in tribal economic self-sufficiency, tribal taxes may implicate federal interests even if there is no additional federal involvement.[293] It seems unlikely that the Court would hold this interest sufficient to preempt state taxes, given its unwillingness to accept the parallel argument that the states' general interest in collecting revenue justifies imposition of taxes on tribal activities where they would not otherwise be permitted.[294] Taxes, therefore, should be imposed as part of a broader regulatory program and not as stand-alone revenue measures, and they are more likely to preempt state taxes if they are enacted in conjunction with federal involvement in tribal affairs.

Increased federal involvement in tribal administration may, in some circumstances, be undesirable enough to outweigh the benefits of additional tax revenue. Courts have suggested that tribes might be able to preempt state taxes on their own, without federal involvement, provided that they exercise "properly delegated federal power to do so."[295] For example, if Congress delegated environmental protection authority to a tribe, and if the tribe exercised its authority to regulate development, pollution, or other on-reservation environmental concerns, then state taxes imposed as part of state environmental regulations might be preempted.[296] Certain kinds of motor vehicle regulations, such as tribal vehicle

293. Barta v. Oglala Sioux Tribe, 259 F.2d 553, 556 (8th Cir. 1958).

294. *See, e.g.*, *Mescalero Apache Tribe*, 462 U.S. at 336; *see supra* text accompanying note 286. The Court has noted that mere federal approval of tribal taxing ordinances is not sufficient to preempt state taxes. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 156 (1979).

295. *See Colville*, 447 U.S. at 156.

296. The Seventh Circuit has found that tribes may even have limited off-reservation jurisdiction with regards to environmental regulation, when off-reservation activity threatens resources on the reservation. *See* Wisconsin v. EPA, 266 F.3d 741, 750 (7th Cir. 2001) (upholding the EPA's designation of "Treatment of State" status on the Mole Lake Band for purposes of administering the Clean Water Act).

registrations, appear to have preemptive force on the reservation independently of federal action.[297] Programs that try to shape individual consumption preferences might preempt conflicting state regulations.[298]

B. *Taxing Nonmembers on Fee Land Under the* Montana *Consent Exception*

After *Atkinson Trading Co.*, any taxes imposed on nonmembers for activity on non-fee land must either be authorized by Congress or must fall within one of the *Montana* exceptions. A difficult question is whether the exceptions encompass much at all. The outlines of the consent exception are especially difficult to determine after *Atkinson Trading Co.* and *Hicks*. The consensual relationship "must stem from commercial dealing, contracts, leases," or other private, consensual arrangements[299] and the tax must "have a nexus to the consensual relationship itself."[300] *Atkinson Trading Co.* left the exact meaning of these requirements very unclear. This section of the Article will consider how tribes might enact valid provisions under this *Montana* exception.

Express consent by nonmembers generally would qualify.[301] This ordinarily would be difficult to obtain, but under certain circumstances,

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297. *See Colville*, 447 U.S. at 162-164 (striking down state vehicle excise tax imposed on cars belonging to tribal members living on the reservation).

298. *Colville* suggested that a tribe could, theoretically, impose a set of cigarette regulations that would preempt conflicting state regulations. *See id.* at 158. The *Colville* respondents suggested that the tribe's interests were served by imposing a cigarette tax that was lower than the state tax, an argument that the Court did not find compelling. *Id.* A more convincing fact scenario would exist if the state challenged a tribal tax that was higher than the state tax. *See id.* Such facts would moot the tax comparative advantage issue in *Colville*, and to the extent that the tax was designed to eliminate certain activity, it would fail as a revenue-raising measure if it succeeded in its regulatory goals. *See id.*

299. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 655 (2001) (internal quotations and citation omitted); Nevada v. Hicks, 533 U.S. 353, 359 n.3 (2001).

300. *Id.* at 656.

301. However, in *Merrion v. Jicarilla Apache Tribe*, the Court suggested that tribal power to tax may be independent of consent. The Court found that the Tribe was not estopped from taxing a business merely because the Tribe and the business entered into a commercial agreement. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 138 (1981). The Tribe had entered mineral leases with Merrion that gave Merrion exclusive rights to mine oil and natural gas on the leased land in exchange for "a cash bonus, royalties, and rents," and reserved to the Tribe the right to use the oil and gas for free on the leased lands. *Id.* at 135. The Tribe imposed a severance tax on oil and gas production that was independent of the contractual agreement. *Id.* at 135-36. The Court said that the Tribe's commercial partnership with Merrion was distinct from its role as governing sovereign, and "[w]hatever place consent may have in contractual matters and in the creation of democratic governments, it has little if any role in measuring the validity of an exercise of legitimate sovereign authority." *Id.* at 147. *Atkinson Trading Co.* qualified *Merrion* and established that consent is relevant to determining the validity of tribal taxes. *Atkinson Trading Co.*, 532 U.S. at 654.

tribes may have the necessary leverage to convince nonmembers to agree to be taxed. Access to on-reservation resources could be linked to consent, and tribes entering into commercial deals with nonmembers could make consent to taxation a contractual condition.[302] The Court also has suggested that fee-for-service schemes are permissible.[303] While "generalized availability of tribal services" cannot sustain jurisdiction, tribes may contract with nonmembers on fee land to provide them with emergency services, trash collection, or other services that the tribe does not provide absent a formal agreement.[304]

Under certain circumstances, it may be difficult enough to distinguish between activity taking place on and off reservation land that a tribe's territorial taxation right may also justify the imposition of taxes extraterritorially. For example, a tribe may wish to impose a severance tax on an energy company that either mines resources from beneath non-reservation land by drilling on reservation land, or vice-versa. By either locating drilling operations on the reservation or accessing reserves located beneath reservation lands, energy companies enter the tribe's territory and arguably consent to tribal jurisdiction. The Court has held that severance taxes on oil and gas production on reservation land are a valid exercise of tribal sovereignty.[305] Such taxes certainly would be frustrated if companies could merely locate on fee simple land and mine the same oil and gas reserves without paying taxes. Although the *Merrion* opinion did not address the location of the oil and gas before it was severed from the land, the holding supports tribal jurisdiction to tax energy resources produced on the reservation generally, and arguably supports jurisdiction regardless of whether they had been located below reservation or fee land.[306]

Taxes could be imposed on other natural resource operations that involve activity on both fee and non-fee land within reservation boundaries. For instance, taxes on timber operations that take place partly on non-fee land might be justified on the grounds that the nonmember harvester consented to tribal jurisdiction of the fee-land operations by choosing to operate partly on non-fee land.[307] The argument would be especially strong where activity on fee land could directly affect resource

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302. *Cf. Merrion*, 455 U.S. at 145-46 (rejecting the argument that the tribe abdicated taxation powers over nonmembers by entering business contracts with them).

303. *Atkinson Trading Co.*, 532 U.S. at 655.

304. *Id.*

305. *See Merrion*, 455 U.S. at 152.

306. *See id.*

307. *Cf.* Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989).

management on non-fee land, as might be the case for a renewable resource such as timber or game.

Tribes might attempt to tax off-reservation businesses that directly benefit from certain kinds of generally available tribal services. *Atkinson Trading Co.* left this possibility open, although the services would need to be very specific so that they would not result in the *Montana* consent exception "swallow[ing] the rule."[308] For example, if the tribe provides an unusual service, such as transportation to and around a remote reservation, use by nonmembers might constitute consent.[309] The nonmembers' use of the services would need to be in connection with commercial dealings, contracts, leases, or other private consensual arrangements.[310]

C. *Taxing Nonmembers on Fee Land Under the* Montana *Self-Governance Exception*

Atkinson Trading Co. narrowed the *Montana* self-governance exception and made it particularly difficult to meet the requirements with respect to taxation. The Court rejected the idea that taxation of nonmembers on fee land is inherently necessary to tribal self-government, and held that the exception in general would be limited to situations where "the drain of the nonmember's conduct upon tribal services and resources is so severe that it actually "imperil[s]" the political integrity of the Indian tribe."[311] Even prior to *Atkinson Trading Co.*, a number of cases suggested that impediments to tribal tax policy would not be viewed as threats to self-government.[312] While *Merrion* has sometimes been cited for the proposition that taxation powers are an important element of tribal self-

308. *Atkinson Trading Co.*, 532 U.S. at 655.

309. *Id.*

310. Nevada v. Hicks, 533 U.S. 353, 359 n.3 (2001).

311. *Id.* at 657 n.12 (internal citation omitted).

312. Cases that evaluate the validity of state taxes determine that the state provisions do not threaten tribal self governance. *See, e.g.*, Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995) (state's power to tax its residents' income trumps any tribal self-governance interest in preempting state taxes on tribal employees who live off the reservation); County of Yakima v. Confederated Tribe and Bands of the Yakima Indian Nation, 502 U.S. 251, 265 (1992) (Indian Reorganization Act does not eliminate state jurisdiction to levy *in rem* taxes on fee land within the reservation); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 156 (1980) (internal citation omitted) ("Washington does not infringe the right of reservation Indians to 'make their own laws and be ruled by them,' merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they currently are receiving.").

government, this aspect of the decision has little weight after *Atkinson Trading Co.*[313]

A tax program that meets the self-governance exception almost certainly would have to be part of a broader regulatory program reflecting non-revenue interests. Taxes on activities that are directly linked to tribal government would be most likely to survive challenge. Tribes could impose taxes or fees to regulate nonmember participation in tribal government through lobbying activities. Nonmembers filing suit in tribal court might be required to make payments for the privilege of availing themselves of the tribal justice system. Where tribal government is linked with religion, preservation of religious heritage may also implicate self-governance, and tax and regulatory programs that protect sites of spiritual significance may fall under the second *Montana* exception.

Other regulatory areas could implicate self-governance and justify tribal taxes on nonmembers. For example, tribal regulation in areas of safety, health and the environment will be stymied if jurisdiction does not extend onto fee-simple land, since businesses could avoid compliance costs by strategically locating just outside of tribal jurisdiction. Such programs may be able to overcome *Brendale* if the tribe can show that the off-reservation activity would have a "demonstrably serious" impact on the tribe.[314]

These examples demonstrate the continuing relevance of the second *Montana* exception after *Atkinson Trading Co.* Nonetheless, the high standard applied in *Atkinson Trading Co.* and the Court's general hostility to self-governance mean that the validity of any such tax would be questionable. Self-governance should be relied on only with great caution, and the case for self-governance taxes will be much stronger if the nonmember being taxed has also consented to tribal jurisdiction.

The examples also illustrate how the self-governance doctrine imposes costs on a tribe's decision to tax nonmembers by requiring that such provisions be enacted in conjunction with extensive regulatory programs. Expenditures in furtherance of the new programs could outweigh increased revenue. The joint impact of the taxes and the regulations on businesses would be greater than the impact of the taxes alone, increasing the possibility that businesses would decide against making investments that could boost reservation economic activity. Tribes also have an interest in being able to choose the manner in which they impose their taxes and

313. *See Atkinson Trading Co.*, 532 U.S. at 654. The relevance of *Merrion* is limited in any case because it dealt with a tribal tax imposed on nonmembers engaging in on-reservation activities, rather than activity on fee land. *See Merrion*, 455 U.S. at 133.

314. *Brendale*, 492 U.S. at 431.

regulations, and the current law limits tribal sovereignty by imposing constraints on tribal tax decisions. When faced with the costs that the self-governance doctrine places on exercising tax jurisdiction, tribes may decide to pass on the additional revenue.

D. *Extrajudicial Responses to Tribal Taxation Decisions*

While tribes might attempt to enact taxes within the existing federal legal framework, the restrictions on tax authority are so severe and poorly-defined that it is often impossible to know whether a provision will survive legal challenge. Tribal governments might be better served by trying to change the rules. Agreements between tribes and states can facilitate the exercise of fiscal policy while avoiding costly litigation that, in the current judicial climate, would be likely to result in further restrictions on tribal tax authority. In the long run, however, legislation is necessary to restore full tax powers to tribes.

Many tribes have entered into agreements with states about balancing tribal and state taxing power.[315] By one count, as many as two hundred such agreements currently exist, with most addressing taxation of non-members on tribal land.[316] These agreements generally require the tribe to collect taxes that approximate or equal to the taxes that would be collected by non-tribal retailers, with the tribes either keeping the revenues or sharing them with the state.[317] The tribes benefit because their tax revenue is higher than it would be if the state collected full state taxes from on-reservation sales and because they retain some autonomy over on-reservation tax collection. Off-reservation retailers benefit too because they need not compete with tribal retailers who otherwise might not collect state taxes on their on-reservation sales.[318] States benefit from revenue-

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315. A list of some of these agreements can be found on the web site of the National Congress of American Indians. *See* National Congress of American Indians, Tax Agreements, *at* http://www.ncai.org/main/pages/issues/governance/agreements/tax_agreements.asp (last visited May 12, 2004).

316. Lorie Graham, *Graham: Securing Economic Sovereignty Through Agreement*, INDIAN COUNTRY TODAY, Sept. 5, 2003, *available at* http://www.indiancountry.com/?1062782561 (last visited July 29, 2004).

317. *Id.*

318. Under *Colville*, states may collect state taxes from on reservation sales, but some state courts have held that their state executives may not collect taxes from on–reservation sales to nonmembers. *See, e.g.*, Mahoney v. Idaho, 524 P.2d 187 (Idaho 1974); *see generally* Kevin Taylor, *4 Tribes to Put Tax Stamps on Cigarettes*, SPOKANE SPOKESMAN-REV., Dec. 6, 2003, *available at* http://www.spokesmanreview.com/pf.asp?date=120603&ID=s1451623& (last visited July 23, 2004).

sharing agreements because they save the cost of enforcing state tax provisions on reservation land.[319]

It is important to realize, however, that tribal benefits from such agreements are limited. Tribes may be motivated to contract with states to hold off state enforcement action and litigation.[320] With the legal rules skewed against them, tribal governments hold weak bargaining positions *vis à vis* the states, and are unlikely to benefit from taxation agreements as much as they would benefit from fully autonomous fiscal powers.

Congressional action could also expand the reach of tribal jurisdiction.[321] Individual enactments addressing specific tribal issues may affect the judicial outcomes on issues such as legal incidence, preemption, consent and self-governance. More sweeping jurisdictional statutes, however, might expand the situations in which tribes may impose taxes free from competing state provisions.[322]

Legislation has the added appeal of addressing the proposition that policy issues related to taxation are best addressed through Congress. Critics of broad tribal authority argue that because nonmembers have no say in tribes' tax policies, imposing taxes on nonmembers is undemocratic.[323] A clear congressional grant of tax jurisdiction would alleviate these accountability concerns.

Courts look frequently to congressional guidance when deciding Indian tax law cases, which are generally statutory in nature.[324] Tribal powers are derived from "retained or inherent sovereignty," which the Court has described as limited by treaties and other congressional enactments.[325] What Congress taketh away, it may also give, and Congress may either authorize tribal taxes or prohibit state taxes that interfere with tribal jurisdiction.[326]

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319. *See id.*

320. *Id.*

321. *See* United States v. Lara, 124 S. Ct. 1628 (2004) (Congress may restore inherent tribal legal authority previously restricted by the political branches).

322. *See* Randi Hicks Rowe, *Tribe's Ability to Tax Non-Indian Businesses Is Major Issue*, NATIVE AM. L. DIG., Aug. 2002, at 1.

323. *See id.*

324. *See, e.g.*, Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995) (invalidating state excise tax on fuel sold by Chickasaw Nation retailers on trust land because the incidence of the tax falls on the retailers); County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992) (General Allotment Act permits state to impose ad valorem tax on land, but not excise tax on land sales); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (Congress may prohibit state taxation of nonmember leases from the tribe).

325. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 649-50 (2001).

326. *See Lara*, 124 S. Ct. at 1628; *Atkinson Trading Co.*, 532 U.S. at 654 ("Because Congress has not authorized the Navajo Nation's hotel occupancy tax through treaty or statute, and because the incidence of the tax falls upon nonmembers on non-Indian fee land, it is incumbent upon the

The National Congress of American Indians (NCAI) has developed a legislative proposal to clarify and broaden tribal jurisdiction in the wake of *Atkinson Trading Co.* and *Hicks*.[327] The model legislation includes an affirmation of tribes' inherent authority to exercise "[w]ithin their territorial jurisdiction, all sovereign governmental authority and powers," including the power to tax.[328] The statute would specify that "[a]n Indian tribe's authority and powers shall extend to all places and persons within its Indian country . . . ,"[329] an area that includes land held in fee simple and that therefore is broader than the current territorial extent of tribal tax authority.[330] Perhaps most significantly, jurisdiction over nonmembers would be extended "to any person, activity, or event having sufficient minimum contacts with a tribe's territorial jurisdiction to meet the requirements of due process."[331] This would replace the *Montana* framework with a laxer, *International Shoe*[332] — type test that could allow tribes to tax nonmember businesses on the basis of their contacts with members or with reservation lands. The expanded jurisdiction would likely include nonmember businesses located on fee-simple land within the reservation.

The model statute contains several provisions that would help to minimize state encroachment on tribal tax jurisdiction. It codifies the categorical prohibition against state taxation of Indians within Indian Country[333] by explicitly prohibiting state exercise of "civil or criminal authority, powers, or jurisdiction within Indian Country or with respect to any valid off-reservation rights unless such state authority is expressly and clearly granted by an Indian treaty, an Act of Congress, or a voluntary agreement between an Indian tribe and a State."[334] This provision applies to both members and nonmembers, so it would broadly invalidate many

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Navajo Nation to establish the existence of one of *Montana*'s exceptions."); *Yakima Indian Nation*, 502 U.S. at 267 (absent congressional grant, there is a "categorical prohibition" against state taxation of tribal members on the reservation).

327. *See* National Congress of American Indians, Tribal Sovereignty and Economic Enhancement Act of 2002, Nov. 15, 2002 [hereinafter Draft Legislation], *available at* www.ncai.org (last visited July 23, 2004).

328. *Id.* §§ 5(b)(1) & (3).

329. *Id.* § 5(c)(1).

330. *See Atkinson Trading Co.*, 532 U.S. at 653 ("An Indian tribe's sovereign power to tax . . . reaches no further than tribal land" and therefore does not include jurisdiction to tax activity on fee simple land). The statute also would amend the current definition of Indian Country to further expand jurisdiction. *See* Draft Legislation, *supra* note 327, § 5(c)(2).

331. Draft Legislation, *supra* note 327, § 5(c)(1).

332. Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

333. *See supra* text accompanying note 326.

334. Draft Legislation, *supra* note 327, § 6(a).

state taxes.[335] However, the statute would not alter state obligations to provide services within Indian Country, and tribes and states would share jurisdiction over such programs.[336] As an additional sweetener for the states, the Payments in Lieu of Taxes statute[337] would be amended so that states would receive federal payments in lieu of taxes for land within Indian Country.[338]

Discussions about the bill's language are ongoing, and the NCAI has found Senate sponsors to introduce the legislation once the NCAI's drafting process is completed.[339] One drawback to a legislative solution, however, is the potential difficulty of passing a statute to broaden tribal powers. As tribes increasingly gain significant political power, a grassroots movement is emerging with the goal of stemming tribal authority.[340] The prospects for passage are difficult to gauge at this point, but nonmember businesses that conduct on-reservation activity or operate in competition with tribal businesses are likely to fight the enactment.

V. CONCLUSION

The case law on tribal taxation has significantly curtailed a vital power inherent to sovereign authority. This is particularly troublesome because it comes at a time when some tribal governments, especially those involved in gaming, are otherwise growing in power and developing greater potential to help all tribal governments assert their sovereign powers and improve on-reservation economic opportunities.[341] As some tribes have gained influence through their business ventures, and as actions taken by Congress and by the executive branch have encouraged self-determination, the judiciary has made it more difficult for tribes to earn revenue through the simple sovereign exercise of taxation. Tribes' power to impose taxes on nonmembers have been narrowly defined, thus limiting the benefits tribes can reap from increasing levels of investment on reservation lands. In addition, the Court has strictly construed the definition of tribal territory to limit the geographic boundaries of tribal tax jurisdiction. Moreover, state tax jurisdiction is being strengthened, making

335. *See supra* text accompanying notes 267-94.

336. Draft Legislation, *supra* note 327, § 6(a).

337. 31 U.S.C. §§ 6901-6907 (2004).

338. *Id.* § 9(b).

339. Press Release, Tribal Sovereignty Protection Initiative (May 19-20, 2003), *available at* www.ncai.org (last visited Mar. 19, 2004).

340. Leslie Linthicum, *Indian Congress Gathers in Duke City*, ALBUQUERQUE J., Nov. 16, 2003, at A1.

341. *See* Graham, *supra* note 316.

it easier for the states to drive out tribal tax programs. The course of development in the case law further weakens substantive tribal powers by leaving the extent of such powers uncertain and open to future litigation by nonmembers and by states.

The tightening in the federal case law may be reactive. Tribal governments posed no threat to the federal system while they remained economically poor. Now that some tribes have become powerful and wealthy, however, their potential impact has grown, not just with regard to effects on individual nonmembers, but also more generally in terms of the national balance of powers. Thus the Court's recent approach to federal Indian law can be viewed as limiting any disruption in the balance between federal and state power that might be caused by more powerful tribal governments.

Tribes that choose to invite nonmembers into their communities should be free to regulate the resulting relationships, including — if they wish — through the power to tax. They should have the same authority as other sovereigns to tax those who benefit by entering their jurisdiction. Given the current state of the case law, however, Tribes should work within the existing framework to shape tax provisions that can survive judicial review. This Article has suggested a number of areas over which valid taxes might be imposed, focusing on preemption, consent, and self-governance. Tribes should also work to prevent the states from imposing taxes that effectively oust tribal jurisdiction.

Ultimately, however, a legislative solution is needed to restore full tribal tax power. The NCAI proposal addresses several important issues by expanding tribal jurisdiction, limiting state jurisdiction, and providing federal payments to states to compensate for lost revenue. Passage of this statute or another legislative solution may be the most effective way for tribes to reclaim full tribal taxation powers and use fiscal policy to build economically strong communities.