Taxes, Theft, and Indian Tribes: Seeking an Equitable Solution to State Taxation of Indian Country Commerce

Adam Crepelle
Southern University Law Center

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TAXES, THEFT, AND INDIAN TRIBES:
SEEKING AN EQUITABLE SOLUTION TO STATE
TAXATION OF INDIAN COUNTRY COMMERCE

Adam Crepelle*

I. INTRODUCTION........................................................................... 999
II. TRIBAL SOVEREIGNTY AND TAXES........................................ 1001
III. QUIL CEDA VILLAGE—A NEW LEVEL OF INJUSTICE.............. 1009
   A. History of QCV ................................................................. 1009
   B. The Tax Showdown at QCV ............................................... 1011
IV. PROBLEM WITH STATE TAXATION OF INDIAN COUNTRY...... 1014
V. SOLUTIONS................................................................................. 1021
   A. State Power Stops at the Reservation’s Edge .................. 1021
   B. Tax ‘Em Back ................................................................. 1028
VI. CONCLUSION.............................................................................. 1032

I. INTRODUCTION

Though often overlooked, Indian tribes are the third sovereign recognized in the United States’ constitutional order.¹ A long and sordid history of colonization resulted in tribes relinquishing much of their land, but only some of their aboriginal sovereignty. Indeed, the settled principle is that tribes possess all inherent powers that have not been expressly or necessarily abnegated by their incorporation into the United States.² The Supreme Court has found three limitations on tribes: tribes cannot alienate their land, tribes cannot prosecute

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* Associate Professor at Southern University Law Center (SULC). Managing Fellow of SULC’s Native American Law and Policy Institute. I would like to thank Peter Ortego, general counsel for the Ute Mountain Ute Tribe, for his thoughtful comments on the paper. I would also like to thank Alison Geisler, my research assistant, for her work on the article.


² United States v. Wheeler, 435 U.S. 313, 323 (1978) (“But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.” (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978))).
non-Indians, and tribes cannot engage in foreign relations without federal approval.3 Accordingly, tribal sovereignty is akin to state sovereignty in that states have those powers that were not surrendered to the federal government in the Constitution4 in contrast to the powers of municipal governments under Dillon’s Rule.5

For the last 50 years, the United States has adopted a policy of tribal self-government.6 The policy’s goal is to free tribes from their dependence on federal funds and allow tribes to build functioning economies on their land. Tribes have made tremendous strides at self-determination; however, tribes still have a long way to go. Economic transformation is the major lag in Indian country.7 Hardly any privately-owned businesses operate in Indian country.8

Several factors contribute to Indian country’s economic despair, but state taxation of Indian country commerce is the most severe impediment to tribal economies. When states collect taxes on Indian country business transactions, tribes are effectively barred from assessing taxes on the transactions because a tribal tax on top of the states’ would make the transaction more expensive. Accordingly, tribes cannot levy taxes on commerce within their borders. This means tribes are forced to fund their government operations through federal grants and tribally-owned enterprises. In fact, businesses operating within Indian

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4 U.S. CONST. amend. X.
5 Merriam v. Moody’s Ex’rs, 25 Iowa 163, 170 (1868) ("[I]t must be taken for settled law, that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation—against the existence of the power.").
8 See Annie Lowery, Pain on the Reservation, N.Y. TIMES (July 12, 2013), https://www.nytimes.com/2013/07/13/business/economy/us-budget-cuts-fall-heavily-on-american-indians.html [https://perma.cc/XSN4-N7AM] ("There is not as much of a private sector presence in Indian country, which tends to be high-poverty and high-unemployment to begin with.") (quoting Amber Ebarb, Nat’l Cong. Am. Indians); Robert J. Miller, Creating Economic Development on Indian Reservations, PERC (Sept. 14, 2012), https://www.perc.org/2012/09/14/creating-economic-development-on-indian-reservations/ [https://perma.cc/5PKW-G638] ("Reservation economies rapidly lose the money that residents receive because of the absence of small businesses where people can spend their cash on needed goods and services.").
country often require tribes to limit the amount of money they can receive based upon the tax rate in the surrounding state.\(^9\)

Tremendous economic injustice results from states imposing taxes within tribal lands. Quil Ceda Village ("QCV") is the most outrageous example of states picking tribal pockets. QCV was created by the Tulalip Tribes on the tribe’s land with virtually no assistance from the state or county government.\(^10\) Tulalip morphed a fruitless piece of land into a bustling commercial zone that directly employs thousands of people and generates hundreds of millions of dollars in regional economic impact.\(^11\) Despite minimal contributions to QCV, the State of Washington and Snohomish County collect over $40 million a year in taxes from QCV.\(^12\) Tulalip collects none.\(^13\)

This Article discusses how tribal sovereignty is imperiled by the Supreme Court’s current tribal tax jurisprudence. It begins by providing an overview of tribal sovereignty and state taxing authority within Indian country. Next, this Article discusses the development of QCV and the court’s affirmation of state taxes at QCV. This Article then proposes two solutions to level the state-tribal tax playing field. Option one is a clear rule prohibiting state taxes within the boundaries of Indian country. Option two is allowing tribes to assess taxes outside of their borders. While the former is preferable, the latter is fair under the Supreme Court’s current jurisprudence.

II. TRIBAL SOVEREIGNTY AND TAXES

Indian tribes existed as full sovereigns long before the arrival of Europeans.\(^14\) Tribes developed unique cultures and systematic laws in order to

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\(^9\) See, e.g., Ute Mountain Ute Tribe v. Homans, 775 F. Supp. 2d 1259, 1274 (D.N.M. 2009) ("To the extent that they can do so without making other operators more attractive to the UMUT, the operators who negotiate leases and agreements with the UMUT take into account the cost of the five New Mexico taxes in reaching terms with the UMUT."). rev'd sub nom. Ute Mountain Ute Tribe v. Rodriguez, 660 F.3d 1177 (10th Cir. 2011).

\(^10\) See infra Section III.A.

\(^11\) Id.

\(^12\) Id.

\(^13\) Id.

\(^14\) McClanahan v. Ariz. Tax Comm'n, 411 U.S. 164, 172 (1973) ("It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government."); Williams v. Lee, 358 U.S. 217, 218 (1959) ("Originally the Indian tribes were separate nations within what is now the United States."); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 542–43 (1832) ("America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws."); Timothy R. Hurley, Comment, Elevating Form over Substance at the Expense of Indian Sovereignty [Wagnon v. Prairie Band Potawatomi Nation, 126
facilitate commerce with other tribes. Therefore, Europeans acknowledged Indian tribes as sovereigns by entreating with the tribes for trade and military advantage. Upon its founding, the United States continued the European tradition of recognizing Indian tribes as sovereigns. The United States entered into treaties with Indian tribes—the constitutional mechanism for transacting relations with separate sovereigns—and claimed commercial transactions involving Indian tribes as an exclusively federal affair.

States desired Indian lands and resources; nonetheless, states knew well they lacked the power to tax commercial activity occurring on Indian land.


See U.S. CONST. art. I, §§ 2, 8; ARTICLES OF CONFEDERATION OF 1777, art. IX, para. 4 (“regulating the trade and managing all affair with the Indians”); Northwest Ordinance, ch. 8, 1 Stat. 50, 52 (1789) (“The utmost good faith shall always be observed toward the Indians . . .”).

U.S. CONST. art. II, § 2, cl. 2; THE FEDERALIST NO. 75 (Alexander Hamilton) (“They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign.”); Ted Cruz, Limits on the Treaty Power, 127 HARV. L. REV. F. 93, 98 (2014) (“The treaty power is a carefully devised mechanism for the federal government to enter into agreements with foreign nations.”).


Consequently, Georgia sought the extermination of the Cherokee Nation in an effort to obtain the nation’s wealth. The Supreme Court boldly denounced Georgia’s effort to extend its laws into the Cherokee Nation, declaring:

The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.

The principle that state power stopped at the borders of tribal land was so well-established that even the Confederate States of America did not allow states to tax tribes. Hence, the Supreme Court rejected state efforts to tax tribes in 1867.

Tribal sovereignty began to slide during the 1870s. Congress passed legislation ending treaty-making with tribes in 1871 and moved towards a policy of breaking up treaty-guaranteed reservations. The Supreme Court, for

no attempts to tax tribes. . . . [T]he states viewed Indian Country as a barrier to the exercise of state power.”).

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


24 Taylor, supra note 21, at 932–33 (“This provision shows that the dominant legal paradigm of political separation for tribes continued in the Confederacy . . . . No Confederate states attempted to tax tribes or activities within tribal boundaries.”).

25 In re Kan. Indians, 72 U.S. (5 Wall.) 737, 757 (1866) (“Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization. As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws.”); In re N.Y. Indians, 72 U.S. (5 Wall.) 761, 771 (1867) (“We must say, regarding these reservations as wholly exempt from State taxation, and which, as we understand the opinion of the learned judge below, is not denied, the exercise of this authority over them is an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations.”).


the first time, authorized state taxes within a reservation’s boundaries in 1885; however, the Court affirmed the state tax because Congress had specifically authorized state law to apply in the case.\(^{28}\) Two years later, Congress passed the General Allotment Act of 1887 ("GAA").\(^{29}\) The GAA broke up reservations by giving each Indian head of household 160 acres placed in trust for 25 years on the theory that the Indian would own the land in fee simple, become a farmer, and obtain American citizenship.\(^{30}\)

Although some proponents of the GAA were well-intentioned,\(^{31}\) most everyone knew it would result in the mass dispossession of the Indians.\(^{32}\) Indeed, the driving force behind the GAA was to flood Indian lands with white settlers in order to accelerate Indian assimilation.\(^{33}\) The GAA was a roaring success at opening Indian lands to settlers, as settlers ended up with 90 million acres of land

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\(^{28}\) Utah & N. Ry. Co. v. Fisher, 116 U.S. 28, 32 (1885) ("By force of the cession thus made, the land upon which the railroad and other property of the plaintiff are situated was, so far as necessary for the construction and working of the road, and the construction and use of buildings connected therewith, withdrawn from the reservation. The road and property thereupon became subject to the laws of the Territory relating to railroads, as if the reservation had never existed.").


\(^{30}\) Id. § 6. ("E\)very Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States and is entitled to all the rights, privileges, and immunities of such citizens . . . ").

\(^{31}\) WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 22 (6th ed. 2015) ("There is little question that the leadership for passage of the Dawes Act came from those sympathetic to the Indians."); Steven J. Gunn, Indian General Allotment Act (Dawes Act) (1887), ENCYCLOPEDIA.COM, https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/indian-general-allotment-act-dawes-act-1887 [https://perma.cc/3VKH-VM7G] (last visited Feb. 14, 2020) ("The Friends of the Indians, an influential group of philanthropists and reformers in the Northeast, believed that if individual Indians were given plots of land to farm, they would flourish and become integrated into the American economy and culture as middle-class farmers.").

\(^{32}\) Crepelle, supra note 15, at 436 ("The real aim of this bill is to get at the Indian lands and open them up to settlement. The provisions for the apparent benefit of the Indians are but the pretext to get at the lands and occupy them . . . . If this were done in the name of greed it would be bad enough; but to do it in the name of humanity, and under the cloak of an ardent desire to promote the Indian’s welfare by making him like ourselves whether he will or not is infinitely worse." (quoting Frank Pommersheim, Land into Trust: An Inquiry into Law, Policy, and History, 49 IDAHO L. REV. 519, 524 (2013))).

that had been guaranteed to the Indians for all of time.\textsuperscript{34} Indians lost their most valuable land\textsuperscript{35} and suffered gross impoverishment due to the GAA.\textsuperscript{36} The mentality motivating the GAA also paved the way for extended state tax authority within reservation boundaries.\textsuperscript{37}

Congress put an end to the GAA, as well as its assimilationist ideology, in 1934 with the Indian Reorganization Act ("IRA").\textsuperscript{38} The IRA authorized the restoration of tribal land bases\textsuperscript{39} and sought to reinvigorate tribal economies.\textsuperscript{40} However, the IRA’s pro-Indian sentiment was short-lived as the United States sought to terminate tribes following World War II until 1970.\textsuperscript{41} Significantly, Congress allowed states to expand their civil and criminal jurisdiction into Indian country, but Congress expressly forbade state taxation of tribal lands.\textsuperscript{42} In 1965, the Court acknowledged the United States’ long held policy of leaving Indians

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{34} \textsc{Canby, supra} note 31, at 23–24.
\item \textsuperscript{35} \textit{ld.} at 24 ("Of the 48 million acres that remained, some 20 million were desert or semidesert.").
\item \textsuperscript{36} \textsc{Lewis Meriam, Inst. for Gov’t Research, The Problem of Indian Administration} 3 (1928) ("An overwhelming majority of the Indians are poor, even extremely poor . . . .").
\item \textsuperscript{37} \textit{See} Thomas v. Gay, 169 U.S. 264 (1898); \textit{see also} Truscott v. Hurbut Land & Cattle Co., 73 F. 60, 64 (9th Cir. 1896) ("We are unable to see any good reason why the authority of the state, and its subordinate subdivisions, the counties, may not also include the taxation of all such personal property found within their geographical limits, although upon the reservation in question, provided, as in this case, the Indians, are in no way interested in it."); Torrey v. Baldwin, 26 P. 908, 912 (Wyo. 1891) ("The county of Fremont had in the year 1889 full right, power, and authority to assess for taxation and levy a tax upon the cattle and horses of the plaintiff which were during all that year kept and located upon the Shoshone Indian reservation.").
\item \textsuperscript{38} \textit{The Indian Reorganization Act—75 Years Later: Renewing Our Commitment to Restore Tribal Homelands and Promote Self-Determination: Hearing Before the S. Comm. on Indian Affairs}, 112th Cong. 1 (2011) (statement of Sen. Daniel K. Akaka, Chairman, S. Comm. On Indian Affairs) ("When Congress enacted the Indian Reorganization Act in 1934, its intent was very clear. Congress intended to end Federal policies of termination and allotment and begin an era of empowering tribes by restoring their homelands and encouraging self-determination."); \textsc{Canby, supra} note 31, at 25 ("The Indian Reorganization Act was based on the assumption, quite contrary to the Allotment Act . . . ."); \textit{Comment, Tribal Self-Government and the Indian Reorganization Act of 1934}, 70 Mich. L. Rev. 955, 955 (1972) ("A major reversal of governmental policy and approach toward Indian affairs was effectuated by the IRA.").
\item \textsuperscript{39} \textsc{Indian Reorganization} (Wheeler–Howard) Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C.A. §§ 5101–5121 (West 2020)).
\item \textsuperscript{40} \textit{See Mescalero Apache Tribe v. Jones}, 411 U.S. 145, 152 (1973) ("The intent and purpose of the Reorganization Act was to rehabilitate the Indian’s economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." (quoting H.R. Rep. No. 1804, at 6 (1934))); \textit{see also} Morton v. Mancari, 417 U.S. 535, 542 (1974) ("The overriding purpose of that particular Act was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.").
\item \textsc{Canby, supra} note 31, at 27.
\item \textsuperscript{41} 18 U.S.C.A. § 1162(b) (West 2020); 28 U.S.C.A. § 1360(b) (West 2020).
\end{enumerate}
\end{footnotesize}
“free from state interference” when holding that states cannot tax non-Indian businesses operating on a reservation with federal approval.43

By the 1970s, the political branches of the United States government had eschewed termination of favor of tribal self-determination— which continues to be the United States’ Indian policy.44 On the other hand, the Supreme Court became less protective of tribal sovereignty in the late 1970s.45 The Supreme Court has sharply circumscribed tribal jurisdiction over non-Indians on questionable legal and historical grounds.46 Contrarily, the Supreme Court has all but abdicated Justice Marshall’s clear rule that state power ends where the reservation begins.47 This jurisdictional inversion has caused tremendous troubles for tribes on a myriad of fronts.48 Nowhere are the troubles more profound for tribes than in the realm of taxation. While tribes retain the ability to tax non-Indians engaged in commerce on the tribe’s reservation,49 the tribal tax power is greatly curtailed.

For example, the Supreme Court held in 2001 that the Navajo Nation could not tax a non-Indian-owned hotel operating within the tribe’s reservation because the hotel happened to be on a tiny patch of fee simple land.50 The Court acknowledged that the Navajo Nation provided vital services to the hotel,51 and interestingly, the Court had previously admitted states provide virtually no

44 See, e.g., supra notes 38–39.
45 Robert N. Clinton, The Dormant Indian Commerce Clause, 27 CONN. L. REV. 1055, 1057 (1995) (“Beginning in the 1970s and accelerating in the last decade, however, the decisions of the Supreme Court more frequently countenance expanding state authority in Indian country by limiting the historic scope of tribal authority in Indian country.”).
49 Merion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980) (“The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.”).
51 Id. at 654–55.
services on the Navajo Reservation. If the tribe wants to fund the governmental services it provides to non-Indians, the Court stated the tribe should bill the non-Indians for the services rather than tax them. Due to allotment, many reservations are heavily "checkerboarded"—alternating tracts of privately-owned non-Indian fee and tribal trust land. Tribes are largely powerless on parcels of non-Indian fee land located on the tribe's reservation.

The Supreme Court has all but shattered the once mighty tribal armor against state taxation. Tribal and individual Indian trust land remain beyond state taxation. Income earned by an Indian on her tribe's reservation is also exempt from state taxation. Other than this, the Supreme Court gives states near carte blanche to tax any transaction—from sales to oil and gas production—on tribal land that involves a non-Indian. The Supreme Court has authorized state taxes on non-Indian businesses operating on a reservation so long as the state asserts it provides the scantest of services on the reservation. In the Supreme Court’s view, the tribe is not impacted by state taxes of tribal commerce provided the

52 Warren Trading Post Co. v. Ariz. Tax Comm’n, 380 U.S. 685, 690 (1965) (“Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities.”).

53 Atkinson, 532 U.S. at 655 (“Although we do not question the Navajo Nation’s ability to charge an appropriate fee for a particular service actually rendered, we think the generalized availability of tribal services patently insufficient to sustain the Tribe’s civil authority over nonmembers on non-Indian fee land.”).

54 Washington v. Confederated Bands and Tribes of Yakima Nation, 439 U.S. 463, 502 (1979) (“In short, checkerboard jurisdiction is not novel in Indian law, and does not, as such, violate the Constitution.”).


56 Okla. Tax Comm’n v. Chickasaw Nation, 515 U.S. 450, 458 (1995) (“Taking this categorical approach, we have held unenforceable a number of state taxes whose legal incidence rested on a tribe or on tribal members inside Indian country.”); Okla. Tax Comm’n v. Sac and Fox Nation, 508 U.S. 114, 123 (1993) (“But our cases make clear that a tribal member need not live on a formal reservation to be outside the State’s taxing jurisdiction; it is enough that the member live in ‘Indian country.’ Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States.”).


58 When an Indian is on a reservation for a tribe other than the one she is enrolled in (for example, a Navajo on the Chitimacha Tribe of Louisiana Reservation), the Indian is a treated as a non-Indian for tax purposes. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 161 (1980).

59 Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 185–87 (1989) (affirming a New Mexico tax on reservation oil production by a non-Indian company though New Mexico provided less than $90,000 worth of services but collected over $2,000,000 in taxes during the oil production).
“legal incidence” of the tax falls upon a non-Indian. Moreover, the Supreme Court requires tribes to comply with state recordkeeping requirements and collect and remit taxes to the state. The Supreme Court has even offered states suggestions on how to impose taxes within tribal lands.

Tribes’ only chance of preventing an outside sovereign from imposing taxes within their borders is an interest balancing test crafted by the Supreme Court. The Supreme Court performs “a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.” The Supreme Court has clearly stated that tribal interests are less important than state or federal interests; hence, the Court has required extreme federal entanglement in tribal matters in order to oust state taxes. Even federal regulations the Supreme Court has described as “all-inclusive” are not

60 Wagon v. Prairie Band of Potawatomi Nation, 546 U.S. 95 (2005); Chickasaw Nation, 515 U.S. at 458 (“The initial and frequently dispositive question in Indian tax cases, therefore, is who bears the legal incidence of a tax.”); Cal. Bd. of Equalization v. Chemehuevi Tribe, 474 U.S. 9, 12 (1985) (“We hold that the legal incidence of California’s cigarette tax falls on the non-Indian consumers of cigarettes purchased from respondents smoke shop, and that petitioner has the right to require respondent to collect the tax on petitioner’s behalf.”).


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


64 McClanahan v. Ariz. Tax Comm’n, 411 U.S. 164, 172 (1973) (“Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption.”).

65 New Mexico v. Mescalero Apache Tribe, 46 U.S. 324, 338 (1983) (“Furthermore, the exercise of concurrent state jurisdiction in this case would completely ‘disturb and disarrange,’ the comprehensive scheme of federal and tribal management established pursuant to federal law.”); Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832, 841-42 (1982) (“The direction and supervision provided by the Federal Government for the construction of Indian schools leave no room for the additional burden sought to be imposed by the State through its taxation of the gross receipts paid to Lembke by the Board.”); Bracker, 448 U.S. at 148 (“In these circumstances we agree with petitioners that the federal regulatory scheme is so pervasive as to preclude the additional burdens sought to be imposed in this case.”).

sufficient to keep state taxes out of Indian country. At present, self-sufficient tribes have essentially no chance at preventing states from taxing commercial activity the tribes have created within their borders. This is loudly evinced by the federal district court’s 2018 decision in Tulalip Tribes v. Washington.

III. QUIL CEDA VILLAGE—A NEW LEVEL OF INJUSTICE

This Part provides an overview of the most outrageous state effort to tax tribal enterprise in the United States’ history. It begins by discussing the history of QCV. Then it turns to the legal challenge surrounding the state and county’s taxes on QCV.

A. History of QCV

The Tulalip Tribes are the heirs of various tribes, including the Snohomish, Snoqualmie, and Skykomish, who signed the Treaty of Point Elliot in 1855. Life was hard for the Tulalip after the treaty. Things began to change for the better when the Tribe adopted a governance structure that was approved by the United States in 1936. A portion of the Tribes’ land was used as a military training ground during the Second World War, but the Tribes regained control over their land postbellum. The Tribes gained greater control over their land by having Congress pass the Tulalip Leasing Act of 1970.

Economic destitution was common amongst the Tribes’ citizens until the Indian gaming boom. Tulalip was one of the first tribes in Washington to enter the gaming arena. Tremendous success was instantaneous; however, Tulalip

67 Milhelm Attea & Bros., 512 U.S. at 61 (concluding that the Indian Trader Statutes the Court had previously held up as “all-inclusive” are not in conflict with New York’s tax laws).

68 Kevin K. Washburn, What the Future Holds: The Changing Landscape of Federal Indian Policy, 130 HARV. L. REV. F. 200 (2017) (noting that when tribes exercise greater control, courts have been less willing to rule in favor of tribes).


71 Id. (For example, tribal children were taken from their parents and forced to attend boarding schools from 1857 through 1932.).

72 Id.

73 Tulalip Tribes, 349 F. Supp. 3d at 1051.


76 Id.
was leery of hanging its future solely on gaming.\textsuperscript{77} Tulalip believed its location would make an ideal site for a business park.\textsuperscript{78} Pursuant to federal law,\textsuperscript{79} Tulalip created the second federal city in the United States—Quil Ceda Village ("QCV"), with Washington, D.C., being the other.\textsuperscript{80} This means QCV is a political subdivision of Tulalip.\textsuperscript{81}

Tulalip built QCV from scratch on a formerly isolated and unproductive tract of land.\textsuperscript{82} Throughout the entire planning process, Tulalip applied its traditional values to design QCV and engineer a unique experience.\textsuperscript{83} Tulalip and the federal government built a road to QCV.\textsuperscript{84} Tulalip and QCV built and continue to maintain QCV's roads, water systems, fiber optic lines, an electrical substation, natural gas lines, and all other physical infrastructure within QCV.\textsuperscript{85} All emergency services within QCV are provided by Tulalip and QCV.\textsuperscript{86} Federal and tribal bureaucracy usually scares businesses away from tribal lands,\textsuperscript{87} but QCV has created an environment conducive to the private sector.\textsuperscript{88} A once desolate parcel now employs thousands of people and generates hundreds of millions dollars in economic activity annually thanks to Tulalip's vision and effort.\textsuperscript{89} Remarkably, Tulalip does not collect any tax revenue from the

\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} 26 U.S.C.A. § 7871 (West 2020).
\textsuperscript{80} Quil Ceda Village, supra note 75.
\textsuperscript{81} Id.
\textsuperscript{83} Quil Ceda Village, supra note 75 ("The Tulalip Tribes selected the Village location in order to protect the natural, cultural, and rural character of the reservation’s undeveloped twenty-one thousand acres. Moreover, the Tribes have carefully supervised the Village’s design so that it would reflect tribal values. During early planning stages, the Tribes adopted a holistic approach to the environment and set aside substantial land within the Village for a park, trails, and a wetland.").
\textsuperscript{84} Tulalip Tribes v. Washington, 349 F. Supp. 3d 1046, 1051 (W.D. Wash. 2018) (noting the tribe provided 76% of the funding for the road to QCV, the federal government provided 19%, and Washington provided 5%).
\textsuperscript{85} Complaint for Declaratory & Injunctive Relief at 7:14-22, Tulalip Tribes, 349 F. Supp. 3d 1046 (No. 2:15-cv-00940); Quil Ceda Village, supra note 75.
\textsuperscript{86} Quil Ceda Village, supra note 75.
\textsuperscript{88} Quil Ceda Village, supra note 75.
\textsuperscript{89} Complaint for Declaratory and Injunctive Relief 1:23–2:3, 2:15–21, Tulalip Tribes, 349 F. Supp. 3d 1046 (No. 2:15-cv-00940).
municipality it created. QCV is currently funded by land lease payments from tenants and other business ventures owned by Tulalip.

B. The Tax Showdown at QCV

Though neither the state nor county made notable contributions to the creation of QCV, both now want to tax it—and do. By the State of Washington’s own admission, the state and county collect tens of millions of dollars in taxes from QCV each year. In 2015, Tulalip and QCV filed a suit to enjoin these taxes on the basis that Tulalip and QCV are responsible for the creation, maintenance, and continued success of QCV and provide all of the essential government services at QCV. Tulalip and QCV argued the state and county taxes prohibit the tribe from assessing taxes that would be used to fund governmental services at QCV. The ability to tax, according to Tulalip and QCV, is essential for Tulalip to become self-sufficient. Indeed, the United States agreed with Tulalip’s view on the tax situation at QCV and intervened on behalf of Tulalip, asserting: “In imposing taxes on Quil Ceda sales, services, and business activities, the State and County seek to raise revenues from activities that cost them nothing, and over which they exercise no control.” Both the State of Washington and Snohomish County answered contending they provide valuable services to QCV.

The federal court sided with the state and county in 2018. At the outset of its opinion, the court noted, “the right to tax does not merely fall to the party whose interests are greatest, or that has provided the most value in government services to the taxpayers at issue.” It stated the legitimacy of the state and local taxes turned on whether federal law had preempted the state tax. The court

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90 Id. at 21:13–14 (“Plaintiffs do not currently implement or enforce these taxes with respect to any non-Tribal businesses in the Village.”).
91 About Us, supra note 70 (describing consumer retail and commercial leasing opportunities).
93 Complaint for Declaratory & Injunctive Relief at 3:11–13, Tulalip Tribes, 349 F. Supp. 3d 1046 (No. 2:15-cv-00940).
94 Id. at 3:3–7.
95 Id. at 2:24–3:3.
96 United States’ Complaint in Intervention at 20:3-6, Tulalip Tribes, 349 F. Supp. 3d 1046 (No. 2:15-cv-00940).
98 Tulalip Tribes, 349 F. Supp. 3d at 1050.
99 Id. at 1050–51.
acknowledged that QCV is predominantly a Tulalip project with a healthy dash of federal assistance. The court concluded that the state and county collected over $40 million in taxes from QCV in 2015 in addition to the tens of millions it had collected in the years before. The court also acknowledged that QCV had its own taxes that it could not impose due to the state and county taxes.

The court began its legal analysis by weighing the federal interests involved in QCV and made clear that greater federal entanglement in the tribal endeavor increased the likelihood of preempting the state taxes. The United States argued it had an interest in Tulalip's economic development and self-sufficiency as set forth in numerous federal laws; moreover, the United States provided over $50 million to help create QCV. However, the court found the federal interest in QCV minimal because:

The United States does not make or even review managerial decisions at the businesses located within Quil Ceda Village, let alone day to day operations. The federal government does not set prices, or regulate advertising, or decide what goods should be sold at QCV, or impose infrastructure requirements, or oversee employment decisions, or regulate the import of goods from off the reservation, or require approval of contracts.

Absent such federal involvement, the court surmised federal interest in QCV must be low.

Tulalip and the United States both argued the Tulalip Leasing Act demonstrated a strong federal interest in promoting economic development at Tulalip. The court determined the Tulalip Leasing Act peeled away the federal regulations that thwart economic development in much of Indian country by granting Tulalip greater control over its reservation lands. Bizarrely, the court concluded that the federal government's empowering the tribe cleared the way for state and county taxes. On top of this, the court claimed the Tulalip Leasing Act only involved leasing; therefore, the state and county sales taxes did not impact any federal interest in QCV obtaining leases. Accordingly, the court

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100 Id. at 1051–52.
101 Id. at 1052.
102 Id. at 1053.
103 Id. at 1054.
104 Id. at 1051.
105 Id. at 1055.
106 Id. at 1056.
107 Id.
108 Id.
109 Id.
concluded that there was no significant federal interest in QCV, \(^{110}\) and whatever federal interest there may be, the state and county taxes did not impact QCV’s ability to lease land.\(^{111}\)

Turning to tribal interests, the court recognized Tulalip’s sovereign interests in economic development.\(^{112}\) QCV helped reduce Tulalip’s unemployment rate from over 70% during the 1970s to roughly 6%, and the court admitted this was a result of the Tribes’ own initiative.\(^{113}\) However, the court rejected the Tribes’ argument that QCV’s value stems largely from the application of Tulalip’s cultural philosophy.\(^{114}\) The court also asserted the tax was not on QCV itself but on the products sold at QCV.\(^{115}\) Based upon this and Tulalip not micromanaging the businesses at QCV, the court held Tulalip had only a slight interest in barring state and county taxes.\(^{116}\)

The court was able to identify only one state and county interest involved at QCV: “raising revenue.”\(^{117}\) The court claimed the key inquiry was “whether the taxes being challenged are justified by provision of services to the taxpayers.”\(^{118}\) Ceding that QCV and Tulalip provide all essential services at QCV, the court stated Washington and Snohomish County also assert they provide services to QCV patrons.\(^{119}\) In particular, the court pointed out that Washington spent $20 billion on education between 2015 and 2017.\(^{120}\) This sealed the deal for the court as it declared, “[w]ithout question, all operations at Quil Ceda Village derive substantial, critical benefits from the high-quality public education Washington provides.”\(^{121}\) The state and counties have other government operations that are available to those who frequent QCV; thus, the
court determined the state and county have a powerful interest in taxing QCV.\(^\text{122}\) Accordingly, the court upheld the state and county taxes on QCV.\(^\text{123}\)

IV. PROBLEM WITH STATE TAXATION OF INDIAN COUNTRY

Allowing states to tax commerce occurring on tribal lands greatly undermines tribal sovereignty. Courts are worried that tribes will serve as little more than tax dodges if state taxes are barred from Indian country.\(^\text{124}\) According to the Supreme Court, the ability to offer lower tax rates gives tribes “an artificial competitive advantage.”\(^\text{125}\) However, states routinely use lower tax rates and other incentives to attract businesses to their jurisdictions.\(^\text{126}\) The Supreme Court’s rationale for treating tribes differently than states appears to be that the Court thinks tribes are lesser sovereigns.\(^\text{127}\) This explains why the Court allowed

\(^{122}\) *Id.* at 1060–62 (listing funding for education, emergency medical services, road maintenance, as well as providing law enforcement officers, access to 911, and Search and Rescue resources as reasons for the court’s decision that the counties both “provide a substantial portion of services that support Quil Ceda Village and the Tulalip reservation”).

\(^{123}\) *Id.* at 1063.

\(^{124}\) *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155 (1980) (“We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.”); Salt River Pima-Maricopa Indian Cmty. v. Arizona, 50 F.3d 734, 738 (9th Cir. 1995) (“Arizona’s ability to tax these sales precludes the Community from creating a tax haven at the mall.” (citation omitted)).

\(^{125}\) *Colville Indian Reservation*, 447 U.S. at 155; *see also* Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 482 (1976) (discussing “the competitive advantage which the Indian seller doing business on tribal land enjoys over all other cigarette retailers” which would otherwise go “virtually unchecked”); Barona Band of Mission Indians v. Yee, 528 F.3d 1184, 1186 (9th Cir. 2008) (“Because the Tribe, as part of its highly lucrative gambling enterprise, merely marketed a sales tax exemption to non-Indians as part of a calculated business strategy, we conclude that its strategic effort to receive construction services from non-Indians at a competitive discount by circumventing the state sales tax does not outweigh California’s interest in raising general funds for its treasury.”).


\(^{127}\) *See* David Y. Kwok, Taxation Without Compensation as a Challenge for Tribal Sovereignty, 84 Miss. L.J. 91, 121 (2014) (“To some extent, it may be unfair that states, particularly the
Kansas to levy taxes that fell upon a tribe despite Kansas providing tax exemptions for transactions involving other sovereigns. Likewise, courts compel tribes to collect and remit taxes to states without any compensation, essentially solidifying tribes' status as little more than tributaries. Tribal sovereignty has been demoted from a starring role to a mere "backdrop" in the Supreme Court's interest balancing test.

The Supreme Court's interest balancing test thoroughly ignores tribes' interest in being self-sufficient. A minimal state interest tips the scales in favor of the state unless the federal government is immensely enmeshed in the tribal operation at issue, and even still, massive federal involvement may not be sufficient to outweigh state interests in taxing tribal commerce. Accordingly, the court in Tulalip claimed that more tribal freedom from federal regulation meant there was more room for state taxes. This, of course, is entirely illogical. Since 1970, the executive and legislative branches have sought to create self-reliant tribal governments. In the words of the Supreme Court, "[t]he power to tax members and non-Indians alike is surely an essential attribute of such self-government; the Navajos can gain independence from the Federal Government only by financing their own police force, schools, and social programs." Nonetheless, the court in Tulalip described the Tribe's interest in collecting taxes at QCV—which Tulalip built and provides all of the traditional government services for—as "little more than financial and the state's ability to tax QCV as "a legitimate state interest."

geographically smaller ones, can compete for local retail customers on the basis of reduced sales tax, while tribes do not have a similar right.

128 See Wagon v. Prairie Band of Potawatomi Nation, 546 U.S. 95, 119 (2005) (Ginsburg, J., dissenting) (noting Kansas exempts transactions "to any other state or territory or to any foreign country" from its fuel tax along with "sale or delivery . . . to a contractor for use in performing work for the United States").

129 Kwok, supra note 127, at 93 ("[S]tates are allowed to force uncompensated tribal retailers to collect taxes on the state's behalf." (citing Dep't of Taxation & Fin. v. Milheme Attea & Bros, 512 U.S. 61, 71 (1994))).


132 See generally Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 186 (1989) ("Thus, although the federal and tribal regulations in this case are extensive, they are not exclusive . . . .").


135 Tulalip Tribes, 349 F. Supp. 3d at 1063.

136 Id. at 1060 (quoting Barona Band of Mission Indians v. Yee, 528 F.3d 1184, 1192–93 (9th Cir. 2008)).
Courts assert, however, that tribes are not being taxed by states if the "legal incidence of the tax" falls upon the non-Indian purchasers. What courts mean by "legal incidence" is that the tax is paid by whoever the statute obligates to pay the tax. The legal incidence can be determined by simply having the legislature declare that the tax's incidence ultimately falls upon the consumer. Courts have admitted the obvious—legal incidence is not the equivalent of economic reality. State taxes—regardless of who bears the legal incidence—impact the price of goods in Indian country, and this impacts consumer behavior

137 Wagnon v. Prairie Band of Potawatomi Nation, 546 U.S. 95, 110 (2005) ("For the foregoing reasons, we hold that the Kansas motor fuel tax is a nondiscriminatory tax imposed on an off-reservation transaction between non-Indians."); Erik M. Jensen, Taxation and Doing Business in Indian Country, 60 ME. L. REV. 1, 57 (2008) ("If the legal incidence of a state tax associated with events inside Indian country falls on a tribe or tribal member, the tax is likely to be invalid. In contrast, if the legal incidence falls on a nontribal member, the tax is likely to be valid, even if the tax has arguably disastrous economic effects for the tribe.").

138 Confederated Tribes & Bands of the Yakama Indian Nation v. Gregoire, 658 F.3d 1078, 1084 (9th Cir. 2011) ("The 'legal incidence' of an excise tax refers to determining which entity or person bears the ultimate legal obligation to pay the tax to the taxing authority."); Sac & Fox Nation v. Pierce, 213 F.3d 566, 578 (10th Cir. 2000) ("[T]he legal incidence of a tax falls upon the entity or individual necessarily responsible for paying the tax under the taxing statutes."); Squaxin Island Tribe v. Stephens, 400 F. Supp. 2d 1250, 1255–56 (W.D. Wash. 2005) ("[T]o discern where the legal incidence lies, we ascertain the legal obligations imposed upon the concerned parties, and this inquiry does not extend to divining the legislature's true economic object. Further, a party does not bear the legal incidence of the tax if it is merely a transmittal agent for the state tax collector." (quoting Coeur d'Alene Tribe v. Hammond, 384 F.3d 674 (9th Cir. 2004) (citations and quotations omitted))).

139 Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 460 (1995) ("And if a State is unable to enforce a tax because the legal incidence of the impost is on Indians or Indian tribes, the State generally is free to amend its law to shift the tax's legal incidence."); Wagnon, 546 U.S. at 102 ("We have suggested that such 'dispositive language' from the state legislature is determinative of who bears the legal incidence of a state excise tax." (quoting Chickasaw Nation, 515 U.S. at 102 (1995))).

140 Coeur d'Alene Tribe, 384 F.3d at 681 ("The person or entity bearing the legal incidence of the tax is not necessarily the one bearing the economic burden." (citation omitted)); Squaxin Island Tribe, 400 F. Supp. 2d at 1255 ("The person or entity bearing the legal incidence of the tax is not necessarily the one bearing the economic burden." (quoting Coeur d'Alene Tribe, 384 F.3d at 681)); Barona Band, 528 F.3d at 1189 ("The party bearing the legal incidence of a state tax may well differ from the party bearing the economic burden of that tax.").
in Indian country.141 Therefore, state taxes alter Indian country’s economic environment and affect tribes’ ability to exercise their sovereign right to tax.142

If both the state and tribe tax the same transaction, double taxation occurs. Justice Ginsburg has recognized the problem created by states taxing tribal transactions noting:

As a practical matter . . . the two tolls cannot coexist. If the Nation imposes its tax on top of Kansas’ tax, then unless the Nation operates the Nation Station at a substantial loss, scarcely anyone will fill up at its pumps. Effectively double-taxed, the Nation Station must operate as an unprofitable venture, or not at all.143

Courts do not permit double taxation in the state or international arena due to the harms it causes.144 Nevertheless, courts permit double taxation within Indian


142 See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980); Mark J. Cowan, Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Protecting Tribal Governmental Revenues, 2 PITT. TAX REV. 93, 94 (2005) (“In other cases, business in Indian country may be double taxed (by both the tribal and state governments), creating disincentives to invest in reservation business ventures.”); Jesse K. Martin, Kansas v. Prairie Band Potawatomi Nation: Undermining Indian Sovereignty Through State Taxation, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 251, 252 (2006) (“The bona fide fact that the off-reservation imposition of the tax on the distributor affects tribal members, because the distributor is economically forced to push the tax downstream, highlights the inequities that exist in the prerequisites to the Bracker interest-balancing test.").

143 Wasson, 546 U.S. at 116 (Ginsburg, J., dissenting) (citations omitted).

144 Clinton, supra note 45, at 1210–11 (citations omitted) (“In the context of the dormant interstate Commerce Clause, multiple state taxation often is avoided by the constitutional requirement of reasonable apportionment or the necessity for one state to afford credit for like taxes paid in another state.”); Cowan, supra note 142, at 94 (“The present tax system thus creates inequities that would never be tolerated in the multistate or international tax arenas.”); Richard D. Pomp, The Unfulfilled Promise of the Indian Commerce Clause and State Taxation, 63 TAX LAW. 897, 908 (2010) (“The Indian tax cases tolerate results that would violate the Interstate Commerce Clause.”).
country leaving tribes with a choice: assess a tax on top of the state tax and make transactions in Indian country more expensive than outside of Indian country or forgo assessing taxes and collect no tax revenue for government operations.145

Either way, tribes lose. Federal law already creates a dense bureaucratic environment that increases the cost of doing business in Indian country.146 Adding an extra tax reduces a business’s profitability and scares away even the most adventurous investor.147 Alternatively, tribes can opt not to tax business occurring on their land. This means tribes have no tax revenue to fund roads, police, courts, and other basic necessities.148 The Supreme Court has admitted tribes suffer economic harm from state taxes on Indian country commerce, but the Supreme Court has simply shrugged its shoulders.149

States claim they use the taxes generated within Indian country to benefit Indian country, but the Supreme Court itself has acknowledged that states do not provide significant value to reservations.150 This is pellucid. Indian country has


146 Crepelle, supra note 15; Crepelle & Block, supra note 87, at 5.

147 Cowan, supra note 142, at 95 (“Businesses, already discouraged from operating on Indian reservations because of a lack of infrastructure or the uncertain application of commercial law, are further chilled by the potential for simultaneous tribal and state taxation.”); Hurley, supra note 14 (citations omitted) (“If the Nation attempted to collect both taxes, its business would be reduced to nothing.”).

148 BIA, ADDRESSING THE HARMs, supra note 145, at 1 (“Or, tribes collect no taxes and suffer inadequate roads, schools, police, courts and health care.”).

149 See Wagnon v. Prairie Band of Potawatomi Nation, 546 U.S. 95, 114 (2005) (“But the Nation cannot invalidate the Kansas tax by complaining about a decrease in revenues.”) (citations omitted); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 186–87 (1989) (“It is, of course, reasonable to infer that the New Mexico taxes have at least a marginal effect on the demand for on-reservation leases, the value to the Tribe of those leases, and the ability of the Tribe to increase its tax rate.”); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 151 (1980) (“Such a tax may be valid even if it seriously disadvantages or eliminates the Indian retailer’s business with non-Indians.”).

150 Wagnon, 546 U.S. at 129 (Ginsburg, J., dissenting) (“The record reveals a different reality. According to the affidavit of the Director of the Nation’s Road and Bridge Department, Kansas and its subdivisions have failed to provide proper maintenance even on their own roads running through the reservation. As a result, the Nation has had to assume responsibility for a steadily growing number of road miles within the reservation (roughly 118 of the 212 total miles in 2000). Of greater significance, Kansas expends none of its fuel tax revenue on the upkeep or improvement of tribally owned reservation roads.”) (emphasis in original) (citations omitted)); Cotton Petroleum Corp., 490 U.S. at 189 (“Cotton’s most persuasive argument is based on the evidence that tax payments by reservation lessees far exceed the value of services provided by the State to the
a dire shortage of police, the worst roads in the United States, and 48% of Indian country households lack basic water infrastructure. States have not addressed these decades-old problems. Instead, states take revenue generated inside Indian country and spend the money on state services outside of Indian country. Indians are the poorest group in the country, continue to face state-

151 Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell, 729 F.3d 1025, 1032 (9th Cir. 2013) ("State governments, including California, appear to have done no better than the federal government in funding law enforcement in Public Law 280 jurisdictions and, as a result, American Indians in Public Law 280 states consistently report that state law enforcement is unavailable or slow to respond.") (citations omitted)); STEWART WAKELING ET AL., U.S. DEP’T OF JUSTICE, POLICING ON AMERICAN INDIAN RESERVATIONS 9 (2001), https://www.ncjrs.gov/pdffiles1/nij/188095.pdf [https://perma.cc/M4NV-B5UY] ("[T]he figures are roughly equivalent to an area the size of Delaware, but with a population of only 10,000 that is patrolled by no more than three police officers (and as few as one officer) at any one time—a level of police coverage that is much lower than in other urban and rural areas of the country."); Eric Lichtblau, California Shorted on Tribal Funding, L.A. TIMES (Oct. 28, 1999, 12:00 AM), http://articles.latimes.com/1999/oct/28/news/mn-27258 [https://perma.cc/28DH-M6CM] (discussing the underfunding of tribal law enforcement in California, a mandatory PL 280 state, and state law enforcement’s neglect of reservations).

152 See POLICY RESEARCH CTR., NAT’L CONG. OF AM. INDIANS, INVESTING IN TRIBAL GOVERNMENTS: AN ANALYSIS OF IMPACT AND REMAINING NEED UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT 2 (2010), http://www.ncai.org/resources/ncai-publications/InvestinginTribalGovernmentsAnAnalysisofARRA.pdf (noting that most jurisdictions receive $5,000 per road mile while Indian country receives $500 per road mile).


154 BIA, ADDRESSING THE HARMs, supra note 145, at 1 (“To add insult to injury, reservation economies are funneling millions of tax dollars into treasuries of state and local governments who spend the funds outside of Indian country.”).

155 SUZANNE MACARTNEY ET AL., U.S. CENSUS BUREAU, POVERTY RATES FOR SELECTED GROUPS DETAILED RACE AND HISPANIC GROUPS BY STATE AND PLACE: 2007-2011 3 (2013), https://www.census.gov/library/publications/2013/acs/acsbr11-17.html [https://perma.cc/E2TS-TVZC] ("By race, the highest national poverty rates were for American Indians and Alaska Natives (27.0 percent) and Blacks or African Americans (25.8 percent).")
imposed barriers to voting, and are a small minority. States have no political incentive to serve Indian country; in fact, the Supreme Court has noted, "the people of the states where they are found are often their deadliest enemies."

The inability to tax forces tribes to start businesses to fund their governments. Few people realize that tribal casinos are not like their non-Indian counterparts. Federal law mandates that tribal casino revenue can only fund the following: the tribal government, the general welfare of tribal citizens, tribal economic development, charity, or, sardonically, non-Indian governments. Federal law requires tribes to compact with states in order to engage in Vegas-style gaming. Though states cannot tax the tribe itself, states can refuse to compact with tribes if the tribe will not turn over a portion of its revenues, and tribes have no remedy if the state acts in bad faith. Tribes have no such power to stop states from allowing casinos to open adjacent to their reservations. States do what they can to pick tribal pockets in other tribal ventures as well, and courts generally let them do it.

Out of all the injustices tribes have suffered at the hands of states in modern times, QCV is the worst. Tulalip took a formerly unproductive tract of land on its reservation, planned, and built QCV without assistance from the state. Tulalip recruits and regulates the tenants at QCV. It maintains the infrastructure and provides all the essential services at QCV. By the court's own admission, QCV is no tax haven. QCV is clearly providing value; otherwise, patrons would not drive to QCV to purchase items easily available online with same-day


158 See Adam Crepelle, Concealed Carry to Reduce Sexual Violence Against American Indian Women, 26 KAN. J.L. & PUB. POL’Y 236, 243 (2017) (“Because Indians are usually minorities within their jurisdiction, state abuses of authority are common in PL 280 states, as there is little political incentive for states to appease Indian country populations.”).

159 United States v. Kagama, 118 U.S. 375, 384 (1886).

160 See generally Matthew L.M. Fletcher, In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue, 80 N.D. L. REV. 759 (2004) (discussing how tribes limited ability to tax forces tribes to pursue alternative sources of revenue such as business development).


162 Id. § 2710(d)(1)(C).


164 Lance Morgan, The Rise of Tribes and the Fall of Federal Indian Law, 49 ARIZ. ST. L.J. 115, 121 (2017) (“In the tribal economic area, the core dispute is often with the powers federal Indian law has granted to the states. The states use this power to directly and indirectly control tribes.”).

delivery.\textsuperscript{166} Rather than rewarding Tulalip for creating a regional economic engine from scratch, the court used QCV’s financial success as justification for state taxation.\textsuperscript{167} This was not the first time tribal economic well-being was weaponized as rationale for state taxes.\textsuperscript{168} The deck is clearly stacked against tribes. The playing field needs to be leveled.

V. SOLUTIONS

Tribes face an uphill battle when it comes to exercising their sovereign right to tax. An easy way to resolve the issue is barring state taxes within Indian country. If tribes want a state service, the tribe can pay for the service. The other solution is to allow tribes to levy taxes beyond their borders. This would be complicated, but it would be fair based upon the Supreme Court’s current Indian tax jurisprudence.

A. State Power Stops at the Reservation’s Edge

The easiest way to end double taxation is by invoking a bright line rule: state taxing authority ends where Indian country begins. Indian affairs were originally intended to be an exclusively federal matter.\textsuperscript{169} To this very day, the United States has a direct government-to-government relationship with Indian tribes.\textsuperscript{170} The federal government’s Indian policy since 1970 has been to foster

\textsuperscript{166} Even the food options at QCV can be easily accessed through apps such as GrubHub, Waiter, and Doordash.

\textsuperscript{167} Tulalip Tribes, 349 F. Supp. 3d at 1063 (“[T]here is no evidence in the record that the State and County collection of taxes here has impeded the Tribes’ ability to thrive financially.” (citation omitted)).

\textsuperscript{168} Barona Band of Mission Indians v. Yee, 528 F.3d 1184, 1192 (9th Cir. 2008) (“Moreover, as noted with the related tribal interest, our concern with self-sufficiency necessarily lessens in the specific context of a multi-million dollar casino expansion.”).

\textsuperscript{169} Worcester v. Georgia, 31 U.S. 515, 557 (1832) (“The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union.”); George Washington Address to Seneca Indians, Dec. 29, 1790, https://pages.uoregon.edu/mjdennis/courses/hist469_senecas.htm [https://perma.cc/F384-8PQR] (“The general Government only has the power, to treat with the Indian Nations, and any treaty formed and held without its authority will not be binding.”).

tribal self-determination and economic development. President Reagan said creating “healthy reservation economies” involves tribes, the federal government, and private business—he did not mention the states. Reducing tribal dependence on federal funds is a core objective of federal Indian policy. The ability to tax is imperative to the fulfillment of these objectives. State taxation of commerce within Indian country subverts federal Indian policy; moreover, state taxes of Indian country commerce are unconstitutional.

State taxation of Indian country economic activity violates the Indian Commerce Clause; in fact, the Constitution was structured to grant the federal government exclusive authority over Indian affairs. According to the plain text of the Constitution, commercial dealings with Indian tribes are an exclusively federal matter. The Supreme Court originally utilized the text of the Commerce Clause to prevent states from meddling with tribal affairs, and the

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172 Statement on Indian Policy, 1 PUB. PAPERS 96 (Jan. 24, 1983).

173 *Id.*

174 Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, n.5 (1982) (McKay, J., concurring) (quoting Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 550 (10th Cir. 1980)) (“It simply does not make sense to expect the tribes to carry out municipal functions approved and mandated by Congress without being able to exercise at least minimal taxing powers, whether they take the form of real estate taxes, leasehold taxes or severance taxes.”).

175 Gregory Ablavansky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1050-51 (2015) (“The interpretation with the best claim to be the original understanding of the federal Indian affairs power was based on a structural interpretation of the Constitution; it read multiple provisions in tandem to preclude state authority over Indian affairs.”); Clinton, *supra* note 45, at 1245 (“The constitutional grant of exclusive federal authority over such matters contained in the Indian Commerce Clause completely preempted the exercise of any state authority in this area.”).


177 United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 194 (1876) (“Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes—a power as broad and as free from restrictions as that to regulate commerce with foreign nations. . . . Accordingly, treaties have been made and laws passed separating Indian territory from that of the States, and providing that intercourse and trade with the Indians should be carried on solely under the authority of the United States.”); *In re Kan. Indians*, 72 U.S. 737, 755 (1866) (“If under the control of Congress, from necessity there can be no divided authority.”); United States v. Holliday, 70 U.S. 407, 418 (1866) (“It follows from these propositions, which seem to be incontrovertible, that if commerce, or traffic, or intercourse, is carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress, although within the limits of a State. The
United States recently asserted the Indian Commerce Clause was intended to prohibit states from regulating commerce with Indian tribes.\(^{178}\) Therefore, state levies within Indian country contravene the Indian Commerce Clause, particularly when the tribe is already taxing the transaction.\(^{179}\)

Unfortunately for tribes, the Indian Commerce Clause no longer has its original and straightforward meaning. In a double taxation case, the Supreme Court rejected the Indian Commerce Clause as a shield against state taxes of Indian country commerce.\(^{180}\) The Supreme Court instead asserted, “the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.”\(^{181}\) This interpretation of the Indian Commerce Clause was rejected by the Court over a century ago\(^ {182}\) and is entirely ahistorical.\(^ {183}\) Thus, the Indian Commerce Clause is no longer an aegis against state encroachment into tribal commerce. Now the Indian Commerce

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\(^{178}\) Brief for the United States as Amicus Curiae at *22, Ramah-Navajo Sch. Bd., Inc. v. Bureau of Revenue, 458 U.S. 832 (1982) (No. 80-2162) (“The Indian Commerce Clause assigns to the Nation, rather than the States, responsibility for Indian affairs, including the intercourse between Indians and non-Indians.”); Brief for the United States at *25, Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980) (No. 78-630) (“The analysis is simply that the Constitution itself - as exemplified in the Indian Commerce Clause - ousts State jurisdiction over all matters within Indian Reservations that significantly touch tribal interests and reserves that area for federal regulation.”); Brief for the United States as Amicus Curiae at *12, Cent. Mach. Co. v. Ariz. State Tax Comm’n, 448 U.S. 160 (1980) (No. 78-1604) (“But, as it happens, the specific history of the Indian Commerce Clause itself confirms its purpose to nationalize white-Indian relations and wholly to exclude State authority to regulate that intercourse.”).

\(^{179}\) Cowan, supra note 142, at 130-31 (“If such double taxation resulted from the imposition of two state taxes on the same transaction, it would be struck down as a burden on interstate commerce under the Interstate Commerce Clause.”).

\(^{180}\) Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) (“The extensive case law that has developed under the Interstate Commerce Clause, moreover, is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause. Most notably, as our discussion of Cotton’s ‘multiple taxation’ argument demonstrates, the fact that States and tribes have concurrent jurisdiction over the same territory makes it inappropriate to apply Commerce Clause doctrine developed in the context of commerce ‘among’ States with mutually exclusive territorial jurisdiction to trade ‘with’ Indian tribes.”).

\(^{181}\) Id.


\(^{183}\) United States v. Lara, 541 U.S. 193, 224 (2004) (Thomas, J., concurring) (“I cannot agree that the Indian Commerce Clause ‘provide[s] Congress with plenary power to legislate in the field of Indian affairs.’ At one time, the implausibility of this assertion at least troubled the Court . . . .” (citations omitted); Ablavansky, supra note 175, at 1081 (noting the plenary power doctrine was not born of the Constitution’s text but of “military and diplomatic conquest” as well as the “rise of a racialist paradigm that denigrated Native peoples and their claims to nationhood”).
Clause is used to conceal the racist origins of Congress’s "plenary power" over Indians.\textsuperscript{184} Plenary power, however, is Congress’s to exercise,\textsuperscript{185} accordingly. Congress can end double taxation in Indian country.\textsuperscript{186} In addition to having an official policy of tribal self-determination, Congress has trust and fiduciary duties to tribes that are furthered by barring state taxes of Indian country.\textsuperscript{187} Congress has considered proposals to address state taxation of Indian country enterprise,\textsuperscript{188} and Congress already provides tax breaks related to work in Indian country.\textsuperscript{189} When the Department of the Interior proposed amending Indian trader regulations,\textsuperscript{190} the public comments overwhelmingly named double taxation as the primary impediment to Indian country economic development.\textsuperscript{191}

\textsuperscript{184} United States v. Bryant, 136 S. Ct. 1954, 1968–69 (2016) (Thomas, J., concurring) ("And, until the Court rejects the fiction that Congress possesses plenary power over Indian affairs, our precedents will continue to be based on the paternalistic theory that Congress must assume all-encompassing control over the 'remnants of a race' for its own good." (citing Kagama, 118 U.S. at 384)); \textit{Robert A. Williams, Like a Loaded Weapon} 72 (2005) ("Significantly, the plenary power doctrine was generated directly out of the principles of white racial superiority affirmed by the Marshall model's originating precedents in a series of major nineteenth-century Supreme Court decisions that followed the Marshall Trilogy."); Robert N. Clinton, \textit{There Is No Federal Supremacy Clause for Indian Tribes}, 34 \textit{Ariz. St. L.J.} 113, 238 (2002) ("Such careful scrutiny reveals the intellectual bankruptcy of the federal Indian plenary power doctrine. Kagama clearly indicated that the basis of the federal Indian plenary power doctrine was not the Indian Commerce Clause nor any textual delegation of constitutional power to Congress, but rather, a late-nineteenth century 'white man's burden' argument for colonialism derived from notions of racial superiority then prevalent in the western drive for colonial empires.").

\textsuperscript{185} Michigan v. Bay Mills Indian Cnty., 572 U.S. 782, 800 (2014) ("We ruled that way for a single, simple reason: because it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity."); Kiowa Tribe v. Mfg. Tech., Inc., 523 U.S. 751, 760 (1990) ("In light of these concerns, we decline to revisit our case law and choose to defer to Congress.").

\textsuperscript{186} Pomp, \textit{supra} note 144, at 1221 ("With a stroke of the pen, Congress could intervene and change the rules of the game, but has shown little inclination in doing so.").

\textsuperscript{187} United States v. Jicarilla Apache Nation, 564 U.S. 162, 176 (2011) ("The Government, following 'a humane and self imposed policy ... has charged itself with moral obligations of the highest responsibility and trust.'" (quoting Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942))).

\textsuperscript{188} Robert William Alexander, \textit{The Collision of Tribal Natural Resource Development and State Taxation: An Economic Analysis}, 27 N.M.L. REV. 387, 419 (1997) ("The recently enacted IERA authorizes establishment of a commission to, among other things, 'develop proposals to address the dual taxation by Indian tribes and States of the extraction of natural resources on Indian reservations."); Cowan, \textit{supra} note 142, at 140 (noting Congress considered "a federal income tax credit for dual taxes paid in Indian country").

\textsuperscript{189} 26 U.S.C.A. § 45A (West 2020); id. § 168(j).


Commentators have called for Congress to end state taxation of Indian country as well.\textsuperscript{192} Several states also have provisions in their enabling acts that prohibit them from taxing Indian lands.\textsuperscript{193} Congress should rebuke the Court and end double taxation.

Politics will likely stand in the way of Congress aiding the tribes. Congress represents the states and not the tribes, and states often oppose tribal interests.\textsuperscript{194} Tribes are currently struggling mightily to urge Congress to pass legislation that recognizes their inherent sovereign right to prosecute people who rape Indian women on reservations.\textsuperscript{195} One can hardly imagine the political resistance tribes will face when trying to stop state taxation.\textsuperscript{196} However, the data may be able to help sway Congress because tribal economic development undeniably benefits states.\textsuperscript{197}

\begin{itemize}
\item[\textsuperscript{17}] Albuquerque\%20NM\%20Transcript\_Indian\%20Traders\%2025\%20CFR\%20140.pdf
\item[\textsuperscript{192}] Alexander, supra note 188, at 419–20 ("As advocated in this Article, the better regime, i.e., one that enhances tribal self-government and economic development, would forbid states to tax private resource developers on reservations, whether or not tribes themselves tax the developers."); Anna-Marie Tabor, Sovereignty in the Balance: Taxation by Tribal Governments, 15 U. FLA. J.L. & PUB. POL’Y 349, 402 (2004) ("Ultimately, however, a legislative solution is needed to restore full tribal tax power.").
\item[\textsuperscript{193}] Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 190 n.23 (1980) (listing cases involving state enabling acts that prohibit state authority over Indian lands).
\item[\textsuperscript{194}] Crepelle, supra note 15, at 449–50.
\item[\textsuperscript{196}] Cowan, supra note 142, at 148 ("[T]he states would fiercely oppose a preemption bill. Preemption does not help out congresspersons themselves and would not score them any major political ‘points’ that would aid in reelection.").
\item[\textsuperscript{197}] Kelly S. Croman & Jonathan B. Taylor, Why Beggar Thy Indian Neighbor? The Case for Tribal Primacy in Taxation in Indian Country 14 (2016), http://nni.arizona.edu/application/files/8914/6254/9090/2016_Croman_why_beggar_thy_Indian Neighbor.pdf ("Tribal economic development adds directly to gross state product when it brings underutilized resources into production; tribal land, infrastructure, natural resources, and other physical capital are put to higher and better use."); Susan Johnson et al., Nat’l Conference of State Legislatures, Government to Government Models of Cooperation Between States
\end{itemize}
Even if Washington and Snohomish County did not collect a cent in taxes at QCV, QCV is a massive benefit for the region because it creates thousands of jobs and hundreds of millions of dollars a year in economic impact on what was formerly an unproductive piece of land. Non-Indians fill most of the jobs at QCV and spend their money off of the reservation. The state can tax non-Indian wages and the off-reservation purchases from QCV employees. Thus, the state reaps rewards from an endeavor it had no part in building and has no role in maintaining. Countless other examples exist of tribal economic success aiding states.

The most equitable solution is to have tribes purchase state services if tribes want state services. Indeed, this is the biggest point of contention—states and counties claim to be providing valuable services to Indian country while tribes contend they do not. States can simply shut off services to Indian country. If the tribe needs a state service, the tribe can pay for it. If the tribe does not need the service, the state can simply cease expending resources in Indian country. Several states and tribes have already entered into tax agreements. Barring state taxation as a baseline simply levels the bargaining power between tribes and states. Besides, states offer tax breaks and incentives to companies


198 See supra Part III.
199 See supra Part III.
200 See supra Part III.

201 KAREN J. ATKINSON & KATHLEEN M. NILES, OFFICE OF INDIAN ENERGY & ECON. DEV., TRIBAL BUSINESS STRUCTURE HANDBOOK I-1 (2008), https://permanent.access.gpo.gov/lps125418/tribal_business_structure_handbook.pdf ("In many parts of the country, Tribes are becoming regional economic and political power houses. They are the largest employer in many counties."); Matthew L.M. Fletcher & Leah Jurss, Tribal Jurisdiction—A Historical Bargain, 76 MD. L. REV. 593, 594 (2017) ("Modern Indian nations are serious economic players in many parts of the United States and are often the largest and most stable employers in large swaths of regional territories.").

202 Ute Mountain Ute Tribe v. Rodriguez, 660 F.3d 1177, 1207 (10th Cir. 2011) (Lucero, J., dissenting) (noting "New Mexico provides no on-reservation services to the Ute Mountain Ute or to oil and gas companies"); BIA, ADDRESSING THE HARMs, supra note 145, at 1 ("To add insult to injury, reservation economies are funneling millions of tax dollars into treasuries of state and local governments who spend the funds outside of Indian country.").

203 Cowan, supra note 142, at 133 ("In the tax arena, over 200 tribes have entered into compacts with over eighteen states.").

204 Hurley, supra note 14, at 463 ("Kansas, however, refused to renew the compact with the Nation in 1995, following the Supreme Court’s decision in Oklahoma Tax Commission v. Chickasaw Nation." (citations omitted)).
all the time. States should, at minimum, treat tribes as well as they treat corporations.

If Congress does not act, the Court can overturn its precedent. The Court has previously made courageous stands in affirming Indian rights, most famously, Chief Justice John Marshall’s reprimand of Georgia for infringing upon the rights of the Cherokee. Deep respect for tribal sovereignty has been expressed by two of the Supreme Court’s newer Justices, Sonia Sotomayor and Neil Gorsuch. Justice Thomas has also expressed discontent with the current state of Indian law, in particular, the Court’s racist, paternalistic, and ahistorical reading of the Indian Commerce Clause. Perhaps this trio can inspire their colleagues to end the unjust practice of double taxation in Indian country.

Barring state taxation within Indian country is the easiest solution to the unjust practice of dual taxation. It simplifies business transactions, will encourage Indian country economic development, and will enable tribes to use tax revenue to fund their governments. This will permit tribes to become self-sufficient, thus furthering the federal government’s avowed Indian policy for the last 50 years. Moreover, ending state taxation of Indian tribes is the moral thing to do. The history of the United States is largely one of plundering tribal resources. State taxation of Indian country economic development is a continuation of this ignoble American tradition. It needs to end. Making

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210 Historic injustices are well known. Lesser known are the more recent pilfering of Indian resources such as the Cobell case. See Jodi Rave, *Milestone in Cobell Indian Trust Case*, HIGH COUNTRY NEWS (July 27, 2011), https://www.hcn.org/issues/43.12/milestone-in-cobell-indian-trust-case.
reservation boundaries impenetrable bulwarks against state taxes stops further depredation of tribes.

B. Tax 'Em Back

The other, and much less desirable, solution to state taxation of Indian country economic activity is allowing tribes to tax economic activity that occurs outside of Indian country. Retaliatory tariffs are authorized under international law, and tribes attempting to level the tax playing field with states fits the retaliation mold.211 Furthermore, the same rationale that supports state taxes within Indian country support assessing tribal taxes outside of Indian country. Courts have upheld state taxes on Indian country economic activity because states create an environment that facilitates Indian country commerce.212 Using tribal casinos as but one example, tribes clearly create value that draws people to their lands.213 Tribes also employ oodles of non-Indians who benefit from the provision of tribal services; thus, there can be an obvious “nexus” between the tribal taxes off reservation and tribal services.

The Supreme Court is not likely to buy this line of reasoning; in fact, the Supreme Court has held that the presumption is a tribe cannot tax non-Indians operating on fee lands within the tribe’s own reservation.214 The ability to categorically tax anyone within the tribe’s lands seems like a more obvious tribal power than extending tribal tax power beyond reservation lands. Despite the bad precedent, the Supreme Court’s decisions in tribal tax cases have produced


212 Ute Mountain Ute Tribe v. Rodriguez, 660 F.3d 1177, 1199 (10th Cir. 2011) (“However, the more important state service—and the one that primarily justifies the New Mexico taxes at issue—is the off-reservation infrastructure used to transport the oil and gas after it is severed.”); see also Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 189 (1989) (“[T]he relevant services provided by the State include those that are available to the lessees and the members of the Tribe off the reservation as well as on it.”); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 157 (1980) (“The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.”); Flandreau Santee Sioux Tribe v. Gerlach, 269 F. Supp. 3d 910, 931 (D.S.D. 2017) (“Although the proceeds of the use tax enter the State’s general fund, which is not earmarked for any expenditures in particular, the Tribe does indeed benefit from off-reservation road maintenance and public safety services leading to the Store, the licensure of some food vendors, as well as other services.”).


inconsistent results.\textsuperscript{215} Additionally, tribes are now performing significantly more government functions than they were when many of the major tribal tax cases were decided.\textsuperscript{216} This should boost tribes’ chances at success in the Supreme Court, but greater tribal government capacity will almost certainly be insufficient to convince the Court to bar state taxes.

Tribes have a stronger case if the off-reservation tax is limited specifically to the tribes’ citizens. Indians often have to leave their reservations to obtain basic goods and find jobs because businesses are leery of operating in Indian country.\textsuperscript{217} The reason for the dearth of businesses in Indian country is not the tribes’ doing; rather, the federal government and states have rendered Indian country inhospitable to private enterprise.\textsuperscript{218} No business wants to pay state and tribal taxes, and without tax revenue, tribes have difficulty providing the governmental services and basic infrastructure that businesses need. On top of this, Indian country is the most densely-regulated region in the United States,\textsuperscript{219} and this means opening a business in Indian country can take over ten times as long as opening a business outside.\textsuperscript{220} Most of these business-killing regulations are federal and based upon antiquated ideologies.\textsuperscript{221} This regulatory maze puts Indian country at a massive competitive disadvantage when it comes to attracting businesses as compared to states.

In addition to the rancid economic environment, many Indians reside outside of Indian country because they were coerced into relocating from their

\textsuperscript{215} Alexander, supra note 188, at 399 (“The Court’s analysis fails to reconcile the opposite outcomes of \textit{Cotton Petroleum} and \textit{Crow Tribe}, and, indeed, reconciling these two outcomes would be difficult.”).

\textsuperscript{216} Washburn, supra note 68, at 201 (“More importantly, in place of federal programs and services, the last fifty years have been characterized by the growth of federal contracting with tribes to perform federal trust functions.”).

\textsuperscript{217} Gavin Clarkson & Alisha Murphy, \textit{Tribal Leakage: How the Curse of Trust Land Impedes Tribal Economic Self-Sustainability}, 12 J.L. ECON. & POL’Y 177, 177–78 (2016) (noting Navajo and Crow Reservation residents drive long distances to reach off reservation Wal-Marts because no stores are on the reservations).

\textsuperscript{218} \textsc{Stephen L. Pevar}, \textit{The Rights of Indians and Tribes: The Authoritative ACLU Guide to Indian and Tribal Rights} 4 (3d. ed. 2002).

\textsuperscript{219} Id. ("No other ethnic or cultural group is so heavily regulated."); Felix S. Cohen, \textit{The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy}, 62 YALE L.J. 352 (1953).

\textsuperscript{220} Shawn E. Regan & Terry L. Anderson, \textit{The Energy Wealth of Indian Nations}, 3 LA. ST. U. J. ENERGY L. & RESOURCES 195, 208 (2014) ("On Indian lands, companies must go through four federal agencies and forty-nine regulatory or administrative steps to acquire a permit to drill, compared with only four steps when drilling off reservation."); \textit{Albuquerque Transcript}, supra note 191, at 5 ("When they’re drilling off reservation, it takes them about four months to get all the permitting process off reservation. On reservation, it takes 31 months for no other reason than it’s our fault.").

\textsuperscript{221} \textit{E.g.}, 25 U.S.C.A. §§ 261–264 (West 2020); 25 C.F.R. § 140.1–.26 (2020).
reservations.\textsuperscript{222} These are not removals done a century ago; rather, many people who were removed from their tribe’s reservation are still alive. Thousands of Indians reside outside of Indian country because the federal government relocated their families to major cities during the 1950s as part of the Indian Relocation Program.\textsuperscript{223} Then, between 25\% and 35\% of Indian children were stolen from their parents and predominantly placed in white homes until 1978.\textsuperscript{224} Hence, states are drawing Indians into their borders based upon artificial competitive advantages over tribes.

State competitive advantages are infringing upon the right of reservation Indians to make their own rules and be governed by them—the hallmark of Indian self-governance.\textsuperscript{225} Tribes face difficulty operating as self-sufficient governments without tax revenue, and tribes have no tax revenue without private sector jobs on their land.\textsuperscript{226} States are luring Indians off the reservation with their easy regulatory environments and comparative tax advantage.\textsuperscript{227} States should not be allowed to seduce Indians to shop off the reservation by offering lower tax rates than the tribe.

For example, a tribe opens a store on its reservation and assesses a tribal tax of 10\% on all goods sold at the store. State taxes do not apply to purchases made by tribal citizens on their reservation, so tribal citizens have to pay the 10\% tax rate. If the state and county sales tax combine for a rate of 7\%, tribal citizens now have an incentive to shop off-reservation in order to evade the higher tribal tax rate.

\begin{itemize}
\item \textsuperscript{224} Joaquin R. Gallegos & Kathryn E. Fort, Protecting the Public Health of Indian Tribes: The Indian Child Welfare Act, HARV. PUB. HEALTH REV. (2017), http://harvardpublichealthreview.org/protecting-the-public-health-of-indian-tribes-the-indian-child-welfare-act/ (“Studies demonstrated that approximately 25–35 percent of Indian children were forcibly removed from their families, often unwarranted, and over 85 percent of Indian children were placed in non-Indian homes.”).
\item \textsuperscript{225} See Williams v. Lee, 358 U.S. 217, 220 (1959).
\item \textsuperscript{226} Taxing government-generated revenue does not add to tribal revenues.
\item \textsuperscript{227} For example, reservation land is often held in trust, and trust land is a massive obstacle to economic development. Gavin Clarkson & Alisha Murphy, Tribal Leakage: How the Curse of Trust Land Impedes Tribal Economic Self-Sustainability, 12 J.L. ECON. & POL’Y 177, 179 (2016).
\end{itemize}
Citizens attempting to dodge lawful taxes is intolerable according to the Supreme Court,\textsuperscript{228} so states should be required to enforce tribal taxes in the same way that tribes are required to enforce state taxes. Consequently, state businesses can verify whether purchasers are Indian or not, collect taxes from Indians, and then remit the taxes to the tribe. This is, after all, a "minimal burden" according to the Supreme Court.\textsuperscript{229} Plus, tribes have jurisdiction over their citizens even when they are outside of the tribe’s territory,\textsuperscript{230} so there is a sound legal basis for the off-reservation tribal taxes. This may be overwhelming if retailers had to remit taxes to each of the 574\textsuperscript{231} federally recognized tribes. However, the burden is analogous to that on tribes if retailers are only required to collect and remit taxes for tribes with reservations adjacent to their town.\textsuperscript{232}

Authorizing tribal taxes of their citizens’ off-reservation purchases is not a good solution to double taxation. It makes purchases more expensive for Indians who are already the nation’s poorest group, and it complicates life for off-reservation retailers. Although it is impractical and has undesirable results, impracticality and undesirability have not stood in the way of states imposing their taxes on tribes. Allowing tribes to do the same to states is fair as it helps level the economic playing field between states and tribes by giving tribes some tax dollars to fund their government operations.

\textsuperscript{228} Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 155 (1980) ("What the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation."); Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 483 (1976) ("The State's requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax.").

\textsuperscript{229} Dep't of Taxation & Fin. v. Milhem Attea & Bros., Inc., 512 U.S. 61, 73 (1994) ("In particular, these cases have decided that States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians.").

\textsuperscript{230} 25 U.S.C.A. § 1911(a) (West 2020); United States v. Mazurie, 419 U.S. 544, 557 (1975) ("Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . ." (citation omitted)); Kelsey v. Pope, 809 F.3d 849, 868 (6th Cir. 2016).


\textsuperscript{232} See Milhem Attea & Bros., 512 U.S. at 77; Confederated Tribes of the Colville Indian Reservation, 447 U.S. at 134; Confederated Salish & Kootenai Tribes, 425 U.S. at 483.
VI. CONCLUSION

The court in QCV was right about one thing: the tribe could not point to a single modern era case supporting its position.\(^{233}\) Sadly, the Supreme Court has made it virtually impossible for tribes to create a tax base. The Supreme Court’s authorizing state taxation of Indian country violates the Constitution and undermines tribal sovereignty. Furthermore, the Supreme Court’s permitting state taxes of tribal commerce contradicts the United States’ Indian policy of tribal self-determination. Until tribes are allowed the same taxing rights as other governments, tribal self-government will be hobbled. Prohibiting state taxes of Indian country will allow tribes to recruit businesses to their land, levy taxes, and operate as the nations they are and always have been.