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## Commentary: In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue

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COMMENTARY:  
IN PURSUIT OF TRIBAL ECONOMIC DEVELOPMENT AS A SUBSTITUTE FOR  
RESERVATION TAX REVENUE

MATTHEW L.M. FLETCHER

Commentators:

Kirsten M. Carlson

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KIRSTEN MATOY CARLSON:<sup>1</sup> First I want to express my thanks for the opportunity to participate in this very important conference, and in particular, to comment on the remarkable and timely paper that Professor Fletcher has presented to us. Before I start, I want to let you all know, just so you don't think I'm talking about a completely different paper, that I'm going to import all of the substance that Matt has told us he left out in giving us the classy portion back in here. So I'm going to spend most of my time actually talking about the proposal that Professor Fletcher makes about our legal structure needing to treat tribes as governments rather than private associations or businesses.

So [I'm] kind of giving you all that caveat to start with so you know that that's kind of where I'm taking his paper. Unfortunately, I'm not going to spend a lot of time, or any time at all discussing the more exciting part which is his long literature aspects in the discussion of *The Usual Suspects*, which I must admit is one of my favorite movies.

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1. Kirsten Matoy Carlson is a Visiting Associate Professor of Law at the University of Minnesota Law School. She teaches and writes in the fields of civil procedure, federal Indian law, constitutional law, and comparative law.

Professor Carlson received a baccalaureate degree in international studies with honors from Johns Hopkins University in 1997, where she was a member of Phi Beta Kappa, a Masters with Distinction in Maaori Studies from the Victoria University of Wellington, New Zealand, where she was a Fulbright Scholar, and her juris doctor, cum laude, from the University of Michigan. While in law school, she served as a contributing editor on the Michigan Law Review and received the American Bar Association Henry J. Ramsey Diversity Award, the Jane L. Mixer Memorial Award for promoting social justice in the law, the S. Anthony Benton Memorial Award for outstanding constitutional law scholarship, a Foreign Language Area Studies Fellowship, and a Clara Belfield and Henry Bates Overseas Fellowship. Following law school, she clerked for The Honorable Diana E. Murphy on the United States Court of Appeals for the Eighth Circuit.

Professor Carlson currently has a National Science Foundation Law and Social Science Grant to finish her dissertation in political science at the University of Michigan. She is a member of the Michigan Bar Association, the American Bar Association, and the Law and Society Association. She is admitted to practice in the United States Court of Appeals for the Eighth Circuit.

I'm going to kind of take us in a slightly different direction, in case someone is back sitting there going, "what does she have to do with what he was talking about." That's how I'm going to connect this up, hopefully.

The central issue that brings us together today is the same issue that tribes have faced since Europeans arrived on this continent over five hundred years ago—the protection of our way of life, governments, structures, land, languages, cultures and very existence. What we commonly call inherent tribal sovereignty.

We are here because tribal sovereignty is intrinsically related to tribal economic self-sufficiency. As Professor Fletcher suggests, the key to our retention of tribal sovereignty in the development of good tribal government is the ability of tribes to find a source of revenue to support the government services, healthcare, education, elderly care, housing, road building, and more that tribes provide to their members, the community within Indian country and those surrounding it.

Today, tribes face additional challenges in protecting their sovereignty—the United States Supreme Court, which is perceived as openly hostile, as Professor Fletcher has just explained, [and] state governors who scheme to profit from tribal gaming, and the growing animosity of a misinformed public far too inclined to establish anti-Indian movements such as one nation.

As these challenges reflect, a lot has changed since Columbus arrived over five hundred years ago, and I want to focus on one of these changes. What Professor Rice called this morning the "forced economic dependency" of the tribes.

When Europeans first landed here, they were largely dependent upon Indians for survival. Everyone knows the infamous, if somewhat mythical story of Squanto and how he helped the pilgrims survive their first winter at Plymouth Rock. That dependency, however, is long gone.

Today Indians—often relegated to remote and useless lands by U.S. federal policies—suffer from staggering rates of poverty. Too many tribal governments depend on unreliable and inadequate federal government funding to provide basic services to their impoverished members.

And while tribes generally would like to change the situation and actively seek access to revenues to fund their desperately needed tribal services through economic development and taxation policies, their efforts are often restricted or undermined by federal legislation and judicial decisions. The current state of the federal legal structure governing tribal taxation is merely one example of this.

Given this reality, more often than not, tribes—described as domestic dependent nations by Justice Marshall in *Cherokee Nation v. Georgia*—are

accused of being economically dependent on the United States. Despite the minimal, the multiple kinds of dependency, I seriously doubt that economic dependency was what Justice Marshall had in mind when he denominated tribes domestic dependent nations.

It is a sad reality for all of America that economics has crept into the phrase. Statistics show that reservation poverty often seeps over into and affects surrounding communities. I would like to suggest, and maybe here is a title for you, that it is time to take the dependent, at least the economic dependency, out of domestic dependent nations. I think Professor Fletcher has an idea about how to change the current legal structure to do so.

Professor Fletcher proposes a viable, practical way to end tribal economic dependency by focusing on another part of Marshall's often repeated phrase. There is no question that by "nation" Marshall meant to recognize tribes as governments with sovereign powers, including the power to tax.

I would like to suggest that what Professor Fletcher is really proposing is that by emphasizing that tribes are sovereign governments in our legal structures we can start to take the dependent out of domestic dependent nations. All three sovereigns, state, federal, and tribal in the United States will benefit if we do. Economically independent tribes will be better able to serve the needs of their impoverished citizens, provide services that benefit the surrounding communities, and reduce both individual tribal member and tribal government reliance on funding from state and federal coffers. Professor Fletcher accurately describes the challenges to creating a viable tribal tax base and pushes us to think beyond the common solution of tribal economic development as a quick fix to economic dependency. By highlighting the interconnectedness between tribal government's ability to tax and encourage economic dependency, such as how the idea of double taxation (that's the idea that both tribes and states can tax the same reservation activities) undercuts and sent us to locate businesses on reservations, he makes a strong case for why economic development alone is an inadequate solution to economic woes.

He presents us with a very simple way to start taking the dependent out of the domestic dependent nations by advocating the courts and legislatures to focus on the last word in Marshall's description: nations. Courts, legislatures, and other federal and state policymakers should remember that tribes are governments rather than private associations and respect them as such. As governments, tribes would have the inherent authority to tax.

The fact that tribes should be treated as governments for tax and other purposes because they are governments and have always been recognized as governments seems so obvious and yet so simultaneously overlooked that I, like Professor Fletcher, am tempted to repeat it. He repeats this like three

times, and at one point to, you know, make sure we get the emphasis of how important this is.

How many businesses do you know that provide housing to their elders, healthcare facilities for their employees, resurface roads, issue hunting and fishing licenses, develop comprehensive legal codes, adjudicate disputes, fine and imprison criminals, and I could go on. But rather than belabor that point, I'll make another one, which is that I personally have never seen a company like 3-M hand out license plates, or heard of anyone applying for a marriage license from Target. And I live in the Twin Cities, so if I'm wrong here and somebody got their marriage license from Target or has a 3-M license plate please tell me after my talk, I really want to hear this.

But while we might think that this point to be obvious, clearly it is not obvious to everyone, least of all the United States Supreme Court, which for the past twenty years has been ignoring congressional and executive self-determination policies explicitly recognizing tribes as sovereign governments. The fact that tribes are engaged in businesses should not lead us to confuse the two. Tribes, unlike most businesses, do far more than maximizing profits. Such reductionism leads us to perverse results and inexplicable ironies.

For instance, have you ever noticed that the federal government increasingly does not want to fund tribal economic dependency through appropriations for tribal services? Yet, at the same time, it refuses to enact policies that will allow tribes to help themselves and end this economic dependency.

It's perplexing, isn't it? I mean it's like let's have our cake and eat it too, or as was suggested earlier as soon as you get enough money we're just going to change the rules.

The good news is that it doesn't have to be perplexing. Rather than continue down the confusing legal path of incoherent precedent and perverse results that we have been plodding along federal, state and local governments, courts, legislatures, bureaucrats, and executives can respect tribes as the governments that they are. Professor Fletcher has recommended several ways that they can do this.

I want to focus on one of Professor Fletcher's proposals. Ironically this isn't the one he focused on. It's another proposal that he mentions in his paper. It's a suggestion that state and federal courts can alter the current legal structures.

Specifically he advocates that courts create a bright-line rule, that tribes are to be treated as governments, that allow tribal governments to compete with state and local governments by marketing tax exemptions, and to

revive the tribal infringement test under *Williams v. Lee*. I would like to build on this recommendation by proposing a concrete way in which the Supreme Court can start treating tribes as governments.

Professional Fletcher has an uncanny sense of timing and maybe we have a window of opportunity here, because the Supreme Court has granted certiorari in *Prairie Band Potawatomi Nation v. Richards*, the first case involving a tribal tax to be taken by the court since *Atkinson Trading Company, Inc. v. Shirley*. Despite the Court's less than stellar record the *Prairie Band* case presents an opportunity for the Court to start treating tribes as the government that they are in the tax arena.

To better understand how the Court can do this let's take a look, a closer look at *Prairie Band Potawatomi Nation v. Richards*. I just want to say something from the outset, that *Prairie Band Potawatomi Nation* is somewhat different from *Atkinson* because the tax there is on tribal trust land, it's not on a stamp of fee land, so there's not the same kind of issue about where, well, the state's trying to say there's an issue about where the tax is, but there's not really one. And as I go through the case you can agree or disagree with how good a characterization that is.

Briefly summarizing the case, it involves an attempt by the state of Kansas to impose, albeit indirectly, a motor tax fuel on non-members conducting business on tribal trust land. The state tax conflicts with the *Prairie Band Potawatomi Nation's* motor tax fuel and the Nation sought to invalidate the state tax on the grounds that it is preempted by federal law and infringes on the Nation's right to self-government and economic development.

The district court granted summary judgment for the state, the Nation appealed, [and] the Tenth Circuit reversed finding that the tax was preempted by federal law and tribal interest and impermissibly infringed on the Nation's rights to self-government. The state then applied for a writ of certiorari arguing that the lower courts applied the wrong test because the case is really about off-reservation taxing of non-members, that the test used should be abandoned anyway, and that the court of appeals erred by giving too much weight to the fact that the tribally owned gas station derives income from casino patrons.

The Supreme Court granted certiorari on February 28, 2005 and plans to hear the case during the October 2005 term. So they should hear it in the fall, and maybe this time next year we'll have a decision, whether we want it or not.

Ideally in this case, the Supreme Court could adopt the bright-line rule that tribes are to be treated as governments and revive the tribal infringement test under *Williams v. Lee*, as proposed by Professor Fletcher

in his paper. The court would then affirm the Tenth Circuit and invalidate the tax.

The court, however, may not be willing to go quite that far, as it would have to abandon a line of tax jurisdiction cases decided since *Williams*. I don't want to go down the road of doom and gloom that since it went to the Supreme Court this is just going to be bad news, because basically Keyser Soze has a better chance than the tribe does here, which is kind of really, really sad. I think the findings are actually like tribes only win 23 percent of the time or something.

So rather than kind of emphasizing how bad this could be, I want to pretend like we can still have optimism when it comes to our Supreme Court. Taking the lessons of being an academic and not having to actually adjudicate this, and thus being able to tell the Supreme Court whatever I think it should be doing or whatever the possibilities are, I would like to suggest that there is an alternative. The Supreme Court can stop short of adopting that bright-line rule in the *Williams* test and still advance the position that tribes should be treated as governments.

The Supreme Court can treat the tribe as a government by reaffirming the applicability of the balancing test that is established in *White Mountain Apache* which considers tribal interests, and reinvigorate it by taking tribal government interest seriously. The court can take tribal government interest seriously by realizing that tribal businesses are inherently related to essential tribal government functions. I think that the Tenth Circuit decision provides the court with some guidance as to how they can do this.

A closer look at the unanimous Tenth Circuit opinion in this case illustrates that the decision can be read as the court following Professor Fletcher's proposal and treating the Nation as a government. While the Tenth Circuit did not explicitly say that it was treating the Nation as a government, it doesn't use this kind of language at all, I want to suggest that to some extent this is essentially what the Tenth Circuit ended up doing.

The Tenth Circuit found that the district court correctly characterized the case as a tribal challenge to a state imposition of tax on non-members doing business on a reservation. After noting that the Indian Commerce Clause Article 1, Section 8, Clause 3 of the United States Constitution applies in this case, the court asks the initial and often dispositive question of who bears the legal incidence of the tax and, like the district court found, that the legal incidence of the tax falls on non-Indians.

The Tenth Circuit then applied the same test that the district court had: the balancing test established in *White Mountain Apache Tribe v. Bracker*. Under the *Bracker* test courts balance federal, state, and tribal interests to see if the state may impose the tax.

The state may impose the tax if the balance favors the state and is not contrary to federal law. In balancing the state, federal, and tribal interests at stake here, the Tenth Circuit respected the Nation as a government.

Without going fully into the court's analysis I want to suggest that the court did this in three ways: (1) by considering the tribal business interests as integral to tribal government and appropriately weighing those interests as such, (2) by seeing the tribe's interests as allied with federal interests in law, and, (3) by rejecting the state's interests as weak.

I want to start with how the court perceived the Nation's interests in this case, and suggest that it treated the Nation as a government by treating the tribal business interests as integral to tribal government and appropriately weighing those interests as such. The court recognized that the Nation has a strong interest in applying its own fuel tax.

Unlike other courts which have refused to see the connection between tribal economic development, tribal tax powers, and tribal government, this court found that the tribe uses the tax revenue it derives from its single gas station to road, to fund road maintenance on the reservation, including the road to the casino, and the gas station. Thus, the tribe has a strong interest in the tax because it funds the essential government service of providing paved roads to and from its casino and other paved roads on the reservation.

The court gave appropriate weight to the tribal government's interests here by rejecting the concurrent tax proposed by the state. Unlike other courts which have ignored the economic burden of concurrent taxes on the tribes, the court found that here a concurrent state tax would elevate gas prices at the tribal gas station to such an extent that the business would no longer be profitable or viable.

The Nation would lose both its vital tax revenues and any profits from the fuel sales that it was now receiving unless it decided to abandon the tax, because it would have to charge so much more to anyone who wanted to use the gas station that no one would want to use it. Either way, the Nation's economic development and governmental infrastructure would suffer.

The court always emphasized that tribes should be treated as governments in considering the federal interests at stake. It determined that the Nation's interests are closely aligned with strong federal interests in promoting tribal economic development, tribal self-sufficiency, and strong tribal government and cited numerous acts of Congress, executive branch policies, and judicial opinions stating these federal interests. These interests clearly mandate that tribes should be treated as governments, and the courts reinforce this idea by finding them aligned with the Nation's interests and as undermining, and as undermined by the state tax.



Finally, the court respected the Nation as a government by recognizing that comparatively the state's sole interest in raising revenues was weak. The court's finding is substantially supported by the undisputed fact that the state collects less than one-tenth of 1 percent of its motor fuel revenues from the Nation, and does not assist the Nation in maintaining the road to the casino and the gas station.

In contrast, all of the Nation's motor fuel taxes are generated from the same gas station. By fairly considering the importance of the Nation's motor fuel tax to its functions as a sovereign government, rather than simply excepting the state's less substantial interests in generating raised, in generally raising revenue the court treated the Nation as the government that it is. The court's rejection of the state's weak interests suggests, and maybe I'm reading too much into this, that the court also rejected the state's own mistake in trying to treat the tribe as a business rather than a government.

That the state treats the Nation as a business and not a government is evident in the Kansas motor fuel statute, which accepts fuel sold or delivered to the United States, its agencies and contractors, and fuels distributed from Kansas to other jurisdictions, including other states, territories and foreign countries. While the statute treats other jurisdictions as separate governments, it explicitly refuses to treat tribes in the same way, even though they are also governments. Further, the state does not appear to have a good reason for treating the tribes as distinct from other jurisdictions other than a misconception of the tribe as a business, and an unrealistic fear that its state tax powers are being greatly diminished.

The state's actions, its motor fuel statute, raised several questions. How can refraining from imposing the tax on non-members doing business on the reservation undermine the state's tax power any more than the exemptions for fuel delivery to other jurisdictions already carved out in the state's tax scheme? Why is it more important, or why is more problematic to recognize tribes or governments than adjacent states, territories, or foreign countries?

Further, if the state's tax power is in such dire jeopardy, as the state argues in its petition for writ of certiorari, why isn't Kansas trying to tax fuel distributed from Kansas to Mexico, Oklahoma or Puerto Rico? If this is such a huge problem why doesn't it extend further than just the situation of fuel being distributed to these reservations?

The state's refusal to recognize and respect tribes as separate sovereigns like these others just doesn't seem to add up. It doesn't seem to make a lot of sense, and it indicates just how weak their interests in this case really are. It also suggests how the court correctly treated the Nation

as a government by rejecting the state's argument and seeing them as, as weak.

The Supreme Court's granting of cert in this case provides it with an opportunity to correct the state's mistake by following the Tenth Circuit lead and then respecting the Nation as a government. The Court can do this by invalidating the state motor tax as applied to non-Indians distributing fuel on the reservation. The Tenth Circuit opinion provides the Court with a template for doing this by respecting the tribes as governments, clearly recognizing and weighing the governmental interests, and rejecting the state's disrespect for the tribes as separate sovereigns.

One final thought for us and the Supreme Court to consider, perhaps what Professor Fletcher's article leaves out, is a more pronounced emphasis on the extent to which his solution of treating tribes as governments is not just an answer for the tribes but is an answer for all of us. What strikes me perhaps more than anything is the myopia of states and local governments and their persistent efforts to tax non-members on tribal land and tribal businesses on tribal land.

Take *Prairie Band* as an example. In that case, there is no evidence that the state is losing a significant amount of revenue to the tribe. Not only does the state tax Indians and non-Indians off the reservation and gain substantial revenues from them, the state admits that the tax on the tribal gas station amounts to a tiny fraction of its overall motor tax revenue.

There is no doubt in my mind the state has, in pursuing this litigation for so long, spent more money trying to collect this motor tax fuel from the Nation than the trivial revenue that it seeks to gain. It seems to me like a huge waste of limited state resources in an era of state economic woes, especially given that the state stands to gain from tribal economic development, which almost always brings added revenue to the state because Indians engage in taxable off-reservation activities.

If the state would not burden tribal businesses with additional taxes, they would profit more and generate more money for tribal members to then spend in off-reservation activities, which in turn would then generate more revenues for the state because then they could legitimately tax them. Wouldn't the state of Kansas be better off not trying to tax the tribe? Shouldn't the Supreme Court encourage the state to do so by treating the Nation as a government?

While affirming the Tenth Circuit in this case rather than setting out a bright-line rule may be a limited victory it's not clear, for instance, whether the Nation's arguments are greatly restricted by any of the facts in this case. It would be a small step in the right direction towards taking the economic dependency out of domestic dependent nations. Perhaps if the court would

respect the Prairie Nation Potawatomi Nation as the government that it is, other courts, legislatures and bureaucrats would follow their lead.

The court's decision could send a message to other courts, state and local officials, that tribes are to be treated as governments and not confused with private associations or businesses, and slowly our legal structure could become more supportive of sustainable tribal economic development. If we are serious about taking the economic dependency out of domestic dependent nations this is the message that the Supreme Court needs to send, that tribes have to be treated as governments. Thank you.

DONALD E. LAVERDURE:<sup>2</sup> First of all I want to thank Professor Matt Fletcher and the North Dakota Law Review for putting on this great and timely symposium as well as the Indian Law Center making it a wonderful conference with a number of varying perspectives. I know that each time I go to these I think I learn more than what I provide in any comments that I have or when I present papers. For me it's always useful, so I'm back here scrambling with notes, as I was up here, as these various thoughts run through my head.

First of all I want to say that this, the paper he's written and what he described actually is interesting for a number of reasons. He's combining economic development concerns, tax powers generally, tribal sovereignty, and literature all in one piece. I would call that intellectually fearless.

I, perhaps, don't have the same capacity to tackle so many subjects and combine them into one paper. He was nice enough to read the entertaining

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2. Donald Laverdure is an expert in taxation of indigenous peoples and tribal court systems. He is also a faculty member in and serves on the board of the American Indian Studies Program at Michigan State University. Professor Laverdure is the Chief Justice of the Crow Nation and Chairman of the Crow Nation Judicial Ethics Board, serving since July 2002 (with numerous written decisions), and is an Appellate Judge of the Keweenaw Bay Indian Community. He has provided expert testimony, written and verbal, before the Canadian Parliament on First Nations self-governance legislation and the Crow Tribal Legislature concerning local government compacts, including water rights and tobacco taxes, tribal tax legislation, judicial impeachment standards and processes, qualifications of tribal judges and separation of powers in tribal governments.

Born on the Crow Indian Reservation, Professor Laverdure writes, and speaks frequently throughout the country, on tribal court systems, taxation in Indian country, indigenous identity and affirmative action, and the historic treaty rights and international status of indigenous peoples. He has published "A Historical Braid of Inequality: An Indigenous Perspective of *Brown v. Board of Education*," and is currently working on several other papers including, "Judicial Conduct in Indian Country," "Tribal Government Land Trusts," and "Local Taxation in Indian Country."

Prior to his arrival at MSU, Professor Laverdure was a Lecturer in Law of Federal Law & Indian Tribes, William H. Hastie Fellow, and Executive Director of the Great Lakes Indian Law Center at the University of Wisconsin Law School. While in private practice, he served as tax counsel, including tax planning and representation in controversy matters, to numerous tribal governments, businesses, and nonprofit clients. In the fall 2000, Professor Laverdure participated in President Clinton's White House Initiative on Tribal Colleges & Universities.

part and not get into the really grinded-out nuts and bolts of too many footnotes that we have to provide for support of authority.

In addition, my imagination has already been beat out of me when I was in engineering so that long literature part I'm helpless on, so I'm going to have to look for the poets and the long literature people to assist me. Maybe resurrecting—remembering everyone's an Indian artist. I was an Indian artist, too, at one time. I'm just an Indian now. The artist part is gone.

I see four overarching things, really. One is taxes, two is the status of tribal governments and in particular their tax power, three is this economic development, and four are the reforms that he proposes. I would like to just briefly go over the road map and then provide some comments on those.

In Professor Fletcher's road map, number one, governments are dependent on revenue. Tribal government's power to tax has been diminished within the context of the recent U.S. Supreme Court activity that's been talked about already.

Two, there has been increasing tribal economic development, and there's been success and failure. He gives a number of examples of that. It's inevitably going to happen with various business ventures. Not all of them are successful. In fact, I think 90 percent of restaurants fail within several years.

Number three, what are the limits on the ability of tribes to engage in various forms of tribal economic development? He gives three examples. The marketing exemption test, which is the *Colville* Test, which has also been talked about, the famous cigarette tax case. What it basically amounts to is the U. S. Supreme Court has said tribes cannot create what we would view the Cayman Islands as, or for that matter South Dakota doesn't have an income tax, Alaska doesn't have an income tax, Florida doesn't have an income tax. We're not going to allow tribes to market that type of exemption despite the fact that other governments can.

A second limit he talks about is non-Indian special interests. The gas station owners, cigarette tax store owners, and their complaints to the state legislature and Congress, which in fact, has impacted the ability of tribes to engage in these various forms of what I would call activities that create tax revenue.

The third limit is what he calls artificial institutional limits, and this goes back to the constitutional status of tribal governments and reality.

And four, reforms, which I'll talk more about in detail. He talks about the "Hicks fix," which has also been introduced which is an omnibus, really, legislation that says let's return back the powers that have been lost by judicial divestiture in the *Oliphant* through *Hicks* decisions and we're going

to go for the whole ball of wax right now. It was proposed as an amendment to the Homeland Security Act. We'll see what happens with that.

Another reform he talked about was a specific congressional amendment to the 1982 Tribal Tax Status Act. I'll talk about that a little bit here in a moment, but it essentially says for federal purposes, tribes will be treated like states for only certain things.

I think a number of people have already commented on, the lunch time speaker mentioned how tribal bond activity, in fact, has been very restricted, not only as a matter of congressional legislation in the text of it, but also in the IRS interpretation of the Internal Revenue Code. Remember that's the enforcement arm enforcing various federal tax statutes and regulations.

And then third, the favorable court ruling. I won't get into that too much because we had Professor Carlson here talk about that in detail, about recent activity in Tenth Circuit case, and I'll just mention a note or two.

So that was the road map. When I read it I thought, again, this is intellectually fearless. And it was a pleasure to read. It was very readable, well written. Here are the comments that I have.

By the way, I run an Indian Law Center, and I not only engage in the academic side, but in the real world side, as people would say. I think they're both real world. We're all living. But nevertheless, that's the dichotomy you hear oftentimes. I do actively still engage in assisting tribal governments, not only with their tax codes but in litigation, oftentimes against state and county governments.

Where are we at with taxes? I talked about the four things. Back to the first one, taxes.

Taxes largely come from income property and activities. The entire federal government's budget is largely based on income taxes. The federal income tax was not made constitutional until 1913, with the passage of the Sixteenth Amendment.

Before that time there were only federal activity taxes. You see a limitation on the view of what the federal government can and can't do. The Sixteenth Amendment had expanded the ability of the federal government to tax the income of individuals, and states have since followed suit. You see oftentimes the two are interlinked when you fill a federal return and there's a state return, and you get various deductions based on how much say property taxes, for example.

Property taxes, that is largely what local governments run on—particularly the county governments. Activity taxes, you see, whether they're townships or other things. Stadiums you see a sales and use tax, you see transaction taxes, all these things, and the long and short of it is at

the national and local level, and largely since World Word II, the number, types, and scope of all these taxes have proliferated beyond anybody's realm or belief, and have largely been upheld. In fact, as a matter of constitutional law, citizen taxpayer suits are largely disallowed on sovereign immunity grounds, and that's one of the problems, so the taxes are generally upheld.

If you view it in that picture, the big picture of taxes by other governments, Indian law is actually consistent with that. Because what Indian law has functionally done is continued to enlarge the scope of not only federal taxes, activity taxes on gaming enterprises, for example, but also state taxes.

If you look at all of these cases down the line from *McClanahan*, *Colville*, *Moe*, *Potawatomi*, and I can go on and on, and *Atkinson*, it's largely been a protection of the ability of state governments to tax in some form or another. So that's actually consistent with the overall view of where tax law has gone.

What we see is a growing presumption that federal and state taxes not only outside of Indian country, but now in the last thirty years inside Indian country, are increasingly being upheld. That's as a matter of federalism principles and other things, and I think largely misguided because it's tripartite federalism, including tribal governments, which largely are ignored and treated as private associations, as you've heard. So that's the big tax picture.

Secondly, tribal government status in the constitutional framework. Professor Pommersheim couldn't have said it better that in fact the Indian Commerce Clause is dealing with, and allowing, the state governments who gave permission to the federal government to act on their behalf for Indian affairs.

Tribal governments were not part of the constitutional convention, nor were they ever contemplated to be. Because of that, they never gave consent or express permission for the various powers in the Constitution itself.

One of those importantly is the federal tax power. So the question became at a certain point, if tribes and their citizens at the time, which were outside the scope of the Constitution, had actually allowed this, where in fact is the consent that was provided for it?

Well, until 1924 by federal statute it was taxation without representation. Now there were some nuances in that about allotment and various citizenship legislation, and also determinations by local courts as they had been done, but it was taxation without representation.

Now we see ourselves—where were the federal counts then? They were no where to be found to protect not only the tribal government status, but individual Indians' right to not be taxed by the federal and state governments.

But here we come to the rescue when tribes start to assert their power now that non-Indians, the poor non-Indians around Indian country, are being assessed tribal taxes and everybody is saying whoa, whoa, whoa that was not contemplated.

As a matter of fact, that's not now an inherent power, although citing *Buster v. Wright* and *Merrion*, two important tribal tax cases, the Supreme Court has backpedaled and said we're going to place tribal tax powers within the *Montana* framework, that there is a presumption against tribal taxes when it affects two major factors, a non-Indian or non-member Indian, and it deals with non-Indian fee land. When those two factors are present, tribal taxes will be struck down.

The big question now has become, in reality, what about on tribal trust land and involving non-Indians? That was the question in *Merrion*. And *Merrion* is being, going to be revisited in this Tenth Circuit case.

My guess is, not to do the doom and gloom, but they will lose because the case actually at the Tenth Circuit level said the federal and tribal interest when combined preempt any state taxes. By the way, that Tenth Circuit decision which upholds tribal sovereignty, the correct view in my opinion, and also within the constitutional status of tribal governments, even if in the shadows, that, in fact, is going to be revisited. I think the Court is going to have no problem striking that down, saying that states can tax under *Cotton Petroleum* and various other cases that go down, including *Colville*.

So, where do we go? We have this long line of cases, and Matt Fletcher had talked about the time line from *Buster*, which was a state circuit decision back at the turn of the 20th Century, to *Merrion*, which was in 1982, to *Atkinson*. And from *Merrion* to *Atkinson*, in the short twenty years tribal tax powers have been largely divested over non-Indians on non-Indian land. The *Montana* exceptions have been upheld.

Parenthetically something that I don't think either a lot of practitioners concentrate on or other academics who dabble in this tax field, the first *Montana* exception actually lists tax licensing and other means, as long as it fulfills a consensual relationship. And I repeat expressly it says taxation.

That has been largely ignored by the U.S. Supreme Court. They just don't cite it. Just like they don't cite the Indian Country Statute from 1948, which is a recodification of U.S. Supreme Court case law in 18 U.S.C. 1151, which parenthetically says reservation, dependent Indian community allotment, and includes rights-of-way. Well, in the *Strate* case it was a

rights-of-way. Cite 1151, the case is over. They just don't cite 1151. So selective citation. It's become problematic because it's been all to the detriment of tribal governments.

So where are they going? What you see is nobody questions other governments' ability to tax. And now even in Indian country. For tribal governments the most positive activity recently has been this 1982 Tax Status Act, which is under 26 U.S.C. 7871. It's also oftentimes called the Internal Revenue Code, which I think you may know a thing or two about out there.

In any event, one thing that I wanted to add into the paper here is not only is the Tribal Tax Status Act in and of itself important because it's express congressional legislation on the status of tribal governments, but there's a set of treasury regulations that interpret the statute, which hardly anyone talks about and do have the force of law when there's ambiguity in a statute and they interpret it. Then another layer which is the IRS itself, interprets the statute and the treasury regulations in what are called revenue rulings or private letter rulings. And those have the force of law, as well.

Revenue rulings are public stances by the IRS, and private letter rulings apply only to the parties. There is a long line, and I'm talking stacks and stacks of revenue rulings and IRS, through the IRS, and also private letter rulings on the status of tribal governments. For a period, believe it or not, the IRS was finding that tribes were states for a whole variety of purposes. Now since the election in 2000 the IRS has largely retreated from that position and we find ourselves back in the same position that we started.

So those are a couple of things that I wanted to add into the legislation part of this, and also say that the IRS obviously now narrowly interprets this express legislation, 26 U.S.C. 7871. So that's tribes as states for limited purposes. It's becoming more narrow. That's where tribes are for tax purposes. For their own tax purposes.

The third point is economic development. Typically economic development is what generates tax revenue. I noted in this paper that Professor Fletcher said as a substitute for tax revenue. I think it's actually accurate to say, but it's inconsistent with how the rest of economic development works in majority society. I'll just give you an example. The tech boom of the '90s. State budget surpluses. Federal surplus. That revenue, the activity created the revenue.

The tech boom busts. Now we're in deficits. Gaming revenue. We see states reaching for that money, right? We heard it as coercion and other things.

This, I want to say is, and it's not listed in the paper per se, but this is an opportunity for tribal governments to be asserting their tribal tax



authority over the various transactions and gaming revenues that are occurring. Put in a tribal tax code and say that we now tax these contractors, and put it in the contract. You have, now, the power to do that.

And do it. Make it settle expectations, and that there are reliance interests on this, and I think then we have what is a test case on the power of tribal governments to tax various activities. You put it in a protectable context, I think.

The reality has been the gaming revenue in Indian country has actually resulted in increased tax revenue for state and local governments. It has resulted in modest improvements for some tribal governments. Not for many. They are using it for government things. So in that way, I think it's consistent with the title that has become the substitute for tax revenue. So that's the economic development realm.

The other major component of that third part really is property. Tribal governments are our local government. Property taxes and activities typically you see are things that generate various revenues for the local governments.

Well, because of *Johnson v. McIntosh* and the so-called discovery doctrine, and I love the quote that Professor Pommersheim had stated before, meeting of two worlds, both very, already both very old, not discovering any one. But as a result of that decision, what has occurred is the federal government, quote unquote, holds title to the property, and there is a use and occupancy right of the tribal government or the individual Indian. The fact that the federal government holds title prevents any property tax from being assessed. So you see, the two are intertwined.

Property taxes are what funds schools. Normally, tribal governments would be able to assess a tax on that, collect the money, and put it into school or other services. They're prevented from doing that because of the Discovery Doctrine and what has become, in my mind, a misplaced concreteness of who exactly owns title. In fact I think it's still a mystery whether the federal government holds title. So that's a major problem. Any scholar or anything that you think of when you think about the tribal tax here, you have to take that into consideration.

Finally reforms. Really what there are, are the three branches here that he mentions. The "Hicks fix," which is a general congressional restoration of tribal tax authority, includes the entire civil arena, includes tribal taxes, as well. Then there is the specific congressional legislation to amend the Tax Status Act.

By the way, there have been many, many attempts to amend the Tribal Tax Status Act, which largely have been unsuccessful. I'm working on a case currently about whether tribal governments can participate in

retirement accounts like local governments, where they pool their funds together and provide for all the citizens that work as government employees. The IRS has again taken a very narrow interpretation of that. But amending the Tax Status Act would go a long way toward that, but I'm not thinking that it's too favorable.

The second branch, the courts, a favorable court ruling, basically resurrect *Buster* and *Merrion*, you know, and go back to that, the pre-*Montana* and also the fact that *Merrion* was after *Montana*, as he aptly states that it should be *sub silentio* overruled to the extent that *Merrion* is still good law. What we have as a court matter, and I've only got a couple of other comments, I know we're running long here, what we really have is a muddled mess for the court rulings in the tribal tax area, as we do more generally.

I'll just give you an example. We have three separate tests that are applied for tribal tax powers, and state tax powers at the same time. The infringement test, which is *Williams v. Lee*, which by the way dealt with tribal adjudicatory jurisdiction, not a tax case. Number two, we had the Preemption Doctrine which has come out of a proliferation of various cases and oftentimes *McClanahan* is the one cited for that. And third, we have this balancing test.

So at any one time if you're litigating a case or you're looking at this area, you always ask the question: well, which test applies? There's three of them. And I'll tell you it doesn't matter. You're going to lose anyway.

But no doom and gloom. Things are going well, only in the context that I have to put the positive spin on it that Professor Pommersheim has. What we're seeing is a major assertion of tribal governments, not only to get economically active, but to assert their sovereign tax power over these activities. This clash is creating this proliferation of tax cases that we're seeing.

*City of Sherrill* was decided two days ago, and I'll talk about that a little tomorrow. That had to deal with, again, local property taxes assessed on the Oneida Nation when they repurchased lands in historic treaty area. The *Potawatomi* case is coming up. So it's really a time of tribal court, tribal governments asserting their power, and federal courts pushing back.

Finally the IRS—they do have a tribal government section of the IRS, believe it or not. I think Sara Crazy Thunder was one of the Lakotas who worked with them. They do try to reach out to tribal governments, but largely have not been followed or successful. They try to guide people or those advocates in Indian country who are assisting with either revenue ruling or private letter ruling. I think it's a helpful avenue. I'm not sure how far it's going to go considering the IRS's overall view of the world.

Two suggestions that I have, to tie it all up. One is I think in Indian country, we need internal clarification of the tribal tax power. This is an example, and I do it too, that we constantly look at federal court decisions, but we never look at tribal court decisions and what tribal governments are going themselves with the tax power. I know, for example, there are at least eight decisions by the Navajo Supreme Court on their own tax power. Crow has four. And others do. Those are never cited.

What do tribal courts think of their own tax power, and shouldn't that be considered adequate and independent grounds for deciding who decides the scope and type of activity for tribal tax power? I think that's important. We need that internal clarification to look internally instead of always externally.

And finally the external activities, I'll just end with the famous quote of Justice Marshall in *McCullough v. Maryland*: "the power to tax is the power to destroy." Well, when you don't have the power to tax how are you going to destroy anything. You have a hard time creating. We have the reverse.

I think that's what this paper starts to take a step towards. I think there is much more of it needed. So thank you.