

1-1-2014

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Recommended Citation

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<https://digitalrepository.unm.edu/tlj/vol15/iss1/4>

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**FOND DU LAC BAND
OF LAKE SUPERIOR CHIPPEWA v. FRANS:
AN EXAMINATION OF STATE TAXATION OF OFF-RESERVATION,
OUT-OF-STATE TRIBAL MEMBER INCOME**

Christopher A. Dodd*

INTRODUCTION

The principle of tribal sovereignty pervades all state and tribal relations. “The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation’s history.”¹ Indian nations are “distinct political communities, having territorial boundaries, within which their authority is exclusive[.]”² This principle often creates conflicts between state and tribal authority. One relationship that has created substantial conflict is state taxation of tribal members, and this issue has resulted in a great deal of litigation. In an attempt to clarify the bounds of each sovereign’s powers, the United States Supreme Court crafted a basic framework for determining whether a state can tax tribal members’ income. This basic framework was established by *McClanahan v. Arizona State Tax Commission*³ and *Mescalero Apache Tribe v. Jones*,⁴ which were decided on the same day in 1973. Essentially, the two cases provide the far ends of the state taxation of tribal members’ income spectrum. In *McClanahan*, the Court held that a state may not tax the income of a tribal member “earned exclusively on the reservation.”⁵ Conversely, in *Mescalero*, the Court found that “Indians going beyond reservation boundaries” are properly subject to state taxation.⁶

* J.D. December 2014, University of New Mexico School of Law. The author would like to thank the professors and staff of the University of New Mexico School of Law for their unflagging dedication to the education of future legal scholars and practitioners. Special thanks to each and every member of the exceptional clinical program, including Professors Grace Allison, Serge Martinez, Sarah Steadman, and Scott Taylor, who provide both an enormous public service and a wonderful learning environment.

¹ *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 168 (1973) (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)).

² *Id.* (quoting *Worcester v. Georgia*, 6 Pet. 515, 557 (1832)).

³ *Id.* at 164.

⁴ *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

⁵ *McClanahan*, 411 U.S. at 165, 168.

⁶ *Mescalero*, 411 U.S. at 147.

While *McClanahan* and *Mescalero* addressed the far ends of the state-taxation spectrum, they provide little guidance for cases that fall in the middle. One case for which *McClanahan* and *Mescalero* provided little guidance is *Fond du Lac Band of Lake Superior Chippewa v. Frans*.⁷ In *Fond du Lac*, the Eighth Circuit was confronted with state taxation of a tribal member's pension income where the pension had been earned off-reservation but outside the taxing state.⁸ The court, in a brief four-page opinion, realized that the situation lay somewhere between *McClanahan* and *Mescalero* but decided that *Mescalero* controlled, as the employment that gave rise to the pension income was off-reservation.⁹ The dissent argued that the majority had taken too narrow a reading of *McClanahan*.¹⁰ While *Fond du Lac* has been briefly mentioned in numerous tax and federal Indian law treatises, it has not received a thorough academic examination.¹¹ This note explains the reasoning of the decision and argues that the dissent's view is correct.

⁷ *Fond du Lac Band of Lake Superior Chippewa Indians v. Frans*, 649 F.3d 849 (8th Cir. 2011). It must be noted that the case name of *Fond du Lac* changed twice while before the Eighth Circuit. At the district court and when initially appealed to the Eighth Circuit, the case was titled *Fond du Lac Band of Lake Superior Chippewa v. Ward Einess*, but it was changed, pursuant to Federal Rule of Appellate Procedure 43(c)(2), to *Fond du Lac Band of Lake Superior Chippewa v. Dan Salomone* on March 3, 2011 after Mr. Salomone replaced Mr. Einess as Commissioner of the Minnesota Department of Revenue. See Order, *Fond du Lac Band of Lake Superior Chippewa v. Einess*, 649 F.3d 849 (8th Cir. March 3, 2011) (No. 10-1236), ECF No. 22. Then, prior to the decision in the case, Myron Frans replaced Dan Salomone as Commissioner, and the title of the case when decided was changed to *Fond du Lac Band of Lake Superior Chippewa v. Myron Frans*. *Fond du Lac*, 649 F.3d 849, note 1 (8th Cir. 2011). Due to these two substitutions, this Note, in short-form citations and generally, will refer to the case simply as *Fond du Lac*. However, the district court case name in long-form citations will be *Fond du Lac Band of Lake Superior Chippewa v. Einess*, while the Eighth Circuit case name in long-form citations will be *Fond du Lac Band of Lake Superior Chippewa v. Frans*.

⁸ *Id.* at 850.

⁹ *Id.* at 852–53.

¹⁰ *Fond du Lac*, 649 F.3d 849, 856 (8th Cir. 2011) (Murphy, J., dissenting).

¹¹ See WALTER HELLERSTEIN, *STATE TAXATION* ¶ 22.07 at 1 (3d ed. 2014); JOHN BOURDEAU ET AL., 71 Am. Jur. 2d *STATE AND LOCAL TAXATION* § 396 (2d ed. 2014); Ann Tweedy, *Commentary on Fond du Lac Band of Lake Superior Chippewa v. Frans*, *TURTLE TALK* (Aug. 19, 2011), <http://turtletalk.wordpress.com/2011/08/19/commentary-on-fond-du-lac-band-of-lake-superior-chippewa-v-frans/>; Gabriel S. Galanda, *The State Tax Man Cometh—Redux*, *INDIAN COUNTRY TODAY MEDIA NETWORK* (Aug. 21, 2011), <http://indiancountrytodaymedianetwork.com/2011/08/21/state-tax-man-cometh-redux>.

Part I outlines the factual background and procedural history of the case. Part II discusses in detail the legal framework for taxation of tribal members' income. Part III explains the court's reasoning, and Part IV explains the position of the dissent. Part V argues that the dissent provided the correct analysis that should have been adopted by the majority. Finally, Part VI addresses the impact the majority opinion has on tribal affairs.

I. STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS

The Fond du Lac Band of Lake Superior Chippewa (“the Band”) is a “federally recognized Indian tribe and occupies the Fond du Lac Reservation [in Minnesota] pursuant to the Treaty of LaPointe with the United States of September 30, 1854, which ‘set apart’ the Reservation for the exclusive occupation and use of the Band.”¹² Charles M. Diver, an enrolled member of the Band, was born on the Reservation but moved to Cleveland, Ohio as a result of the federal Indian Relocation Program.¹³ For thirty years, Diver worked “as a dock worker with Yellow Freight System in Richfield, Ohio and was a member of the Teamsters Union, through which he accrued retirement savings.”¹⁴ After retiring, Diver returned to the Reservation in 1998.¹⁵ “From 1998 through 2008, he [paid] Minnesota income tax on his pension benefits received from the Teamsters Union, as accrued during his period of employment with Yellow Freight System from 1967-1997, and specifically paid income tax on \$30,000 of pension income

Indeed, the most thorough analysis of *Fond du Lac* is contained in a student paper published prior to the decision of the Eighth Circuit, which provides a good summary of the proceedings, the arguments of the parties, and a rather prescient prediction. Erin Lillie, *State Authority to Tax Out-of-State Income of Reservation Indians: A Note on Fond du Lac v. Einess*, Working Paper 2010-03, INDIGENOUS LAW & POLICY CENTER OCCASIONAL PAPER SERIES, <https://www.law.msu.edu/indigenous/papers/2010-03.pdf> (last visited Nov. 29, 2014).

¹² Mem. Supp. Pl.'s Am. Mot. Summ. J. at 2, *Fond du Lac Band of Lake Superior Chippewa v. Einess*, No. 09-00385 (D. Minn., Aug. 24, 2009), ECF No. 34. *See also* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 79 Fed. Reg. 4748-02, 4751 (Jan. 29, 2014).

¹³ Mem. Supp. Pl.'s Am. Mot. Summ. J. at 4, *Fond du Lac Band of Lake Superior Chippewa v. Einess*, No. 09-00385 (D. Minn., Aug. 24, 2009), ECF No. 34.

¹⁴ *Id.* at 4-5.

¹⁵ *Id.* at 5.

in 2008.”¹⁶ Another plaintiff was originally involved in the case, but his claims became moot early in the litigation.¹⁷

B. PROCEDURAL HISTORY

The Band filed suit in the United States District Court for the District of Minnesota seeking declaratory and injunctive relief to prevent Minnesota’s taxation of the-out-of-state income of Band members residing on the Reservation.¹⁸ The facts were not disputed by the parties, and the case presented a purely legal issue: whether Minnesota could legally tax out-of-state pension income of Band members living on the Reservation.¹⁹ Based on the lack of factual dispute, the Band moved for summary judgment.

The district court denied the Band’s motion for summary judgment, determining that state taxation of out-of-state pension income of tribal members living on tribal lands is permissible under federal law. As a result of the court’s order denying summary judgment, the parties stipulated to a “judgment on the merits in Defendant’s favor[.]”²⁰ Consequently, the district court ordered the case dismissed with prejudice,²¹ and the Band appealed the denial of summary judgment to the Eighth Circuit.²²

¹⁶ *Id.*

¹⁷ Leonard M. Houle was also a member of the Band who had his out-of-state pension income taxed. *Id.* at 3–4. However, the controversy as to the taxation of Houle’s pension became moot and was therefore irrelevant to the decision of the Eighth Circuit. Minnesota conceded that Houle’s pension was not subject to state income taxation, as it was a military pension. Mem. Def. Ward Einess Opp’n Pl.’s Am. Mot. Summ. J. at 3–4, Fond du Lac Band of Lake Superior Chippewa v. Einess, No. 09-00385 (D. Minn., Oct. 2, 2009), ECF No. 36.

¹⁸ Amended Complaint, Fond du Lac Band of Chippewa v. Einess, No. 09-00385 (D. Minn., July 31, 2009), ECF No. 30.

¹⁹ Fond du Lac Band of Lake Superior Chippewa v. Einess, No. 09-00385, slip op. at 2 (D. Minn. Nov. 4, 2009) (order denying summary judgment), ECF No. 41.

²⁰ Stipulation for Entry of Judgment at 1, Fond du Lac Band of Lake Superior Chippewa v. Einess, No. 09-00385 (D. Minn., Dec. 28, 2009), ECF No. 42.

²¹ Order at 1, Fond du Lac Band of Lake Superior Chippewa v. Einess, No. 09-00385 (D. Minn., Dec. 29, 2009), ECF No. 43.

²² Amended Notice of Appeal, Fond du Lac Band of Lake Superior Chippewa v. Einess, No. 09-00385 (D. Minn., Feb. 2, 2010), ECF No. 50.

II. LEGAL BACKGROUND AND ISSUES PRESENTED

Two issues were addressed by the Eighth Circuit. These were: 1) whether state income taxation of a tribal member's pension income is barred by due process when the income is received on the reservation and is derived from out-of-state, off-reservation employment, and 2) whether such taxation is otherwise barred by principles of tribal immunity from state taxation.²³

A. DUE PROCESS REQUIREMENTS FOR STATE TAXATION

The jurisdiction of a state's taxing authority "extends over all its territory, and everything within or upon it, with a few known exceptions."²⁴ This general principle provides the baseline protections from state taxation afforded by the Due Process Clause of the United States Constitution. An individual cannot be permissibly subject to taxation by a state with which he does not have sufficient minimum contacts. "The Due Process Clause requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."²⁵ Further, there must be a "rational relationship between the tax and the values connected with the taxing State."²⁶ The basic inquiry is "whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state—that is, whether the state has given anything for which it can ask in return."²⁷

Residency and domicile are the most common grounds upon which states may base taxation. If an individual resides in the state, the state may tax all of that individual's income, including income derived from both in-state and out-of-state employment.²⁸ In *Lawrence v. State Tax Commission of Mississippi*, the Court explained:

²³ *Fond du Lac Band of Lake Superior Chippewa Indians v. Frans*, 649 F.3d 849, 850-52 (8th Cir. 2011).

²⁴ *M'Culloch v. Maryland*, 17 U.S. 316, 342 (1819).

²⁵ *Fond du Lac*, 649 F.3d 849, 850 (8th Cir. 2011) (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992)) (internal quotations and citations omitted).

²⁶ *MeadWestvaco Corp. ex rel Mead Corp. v. Illinois Dept. of Revenue*, 553 U.S. 16, 24 (citing *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992)) (internal quotations and citations omitted).

²⁷ *Id.* (quoting *ASARCO Inc. v. Idaho Tax Comm'n*, 458 U.S. 307, 315 (1982)) (internal quotations and citations omitted).

²⁸ *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 280 (1932).

The obligation of one domiciled within a state to pay taxes there, arises from the unilateral action of the state government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to distribute its burdens equably among those who enjoy its benefits. Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government.²⁹

The due process issue presented to the Eighth Circuit in *Fond du Lac* was whether this general rule also applied to tribal members residing on the reservation. If tribal members are residents of the state in which their reservation lies, then under the general resident taxation rule, the imposition of income tax on a tribal member's pension income earned outside of the taxing state does not violate due process.

B. TRIBAL IMMUNITY FROM STATE TAXATION

Historically, Indian tribes were immune from state taxation under the same rationale established in *M'Culloch v. Maryland*—that the tribes, like the United States Bank in *M'Culloch*, were federal-instrumentalities that could not be constitutionally subject to state taxation.³⁰ However, “[t]his approach did not survive”³¹[:]

The contemporary constitutional basis for [state tax] immunity is a source of considerable controversy—it is variously attributed to notions of inherent tribal sovereignty, the special trust relationship between the federal government and the Indian tribes, and the negative implications of the congressional power to regulate commerce with the Indian tribes.³²

²⁹ *Id.*

³⁰ *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 150 (1973).

³¹ *Id.*

³² WALTER HELLERSTEIN, *STATE TAXATION* ¶ 22.07 at 1 (3d ed. 2014).

Whatever the source of tribal members' tax immunity,³³ the United States Supreme Court provided a framework for applying the immunity to state income taxation in the sister cases of *McClanahan v. Arizona State Tax Commission*³⁴ and *Mescalero Apache Tribe v. Jones*.³⁵

i. *McClanahan v. Arizona State Tax Commission*

McClanahan resolved “the narrow question [of] whether the State may tax a reservation Indian for income earned exclusively on the reservation.”³⁶ Factually, the case was rather simple. Rosalind McClanahan was “an enrolled member of the Navajo tribe who live[d] on that portion of the Navajo Reservation located within the State of Arizona.”³⁷ All of McClanahan’s income “earned during 1967 was derived from within the Navajo Reservation[,]” and as a result of this income, Arizona assessed \$16.20 in state income tax.³⁸ McClanahan challenged the imposition of the tax in Arizona Superior Court, and her case was dismissed for failure to state a claim.³⁹ The Arizona Court of Appeals affirmed the dismissal, and the Arizona Supreme Court denied review.⁴⁰ McClanahan appealed to the United States Supreme Court.⁴¹ The Court granted certiorari and decided the case in favor of McClanahan. While the Court recognized that there had been a trend “away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption[,]”⁴² it emphasized that tribal sovereignty is an important backdrop for a preemption analysis. The Court explained:

The relation of the Indian tribes living within the borders of the United States is an anomalous one and of a complex character. They were, and always have been, regarded as having a semi-independent position when

³³ It is beyond the scope of this note to determine the true legal source, if any, of tribal tax immunities.

³⁴ *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164 (1973).

³⁵ *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

³⁶ *McClanahan*, 411 U.S. at 168.

³⁷ *Id.* at 166.

³⁸ *Id.* at 167.

³⁹ *Id.* at 166.

⁴⁰ *Id.* at 167.

⁴¹ *Id.*

⁴² *Id.* at 172.

they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they reside[.].⁴³

In this context of tribal sovereignty, the Court analyzed the treaty establishing the Navajo Reservation, the Arizona Enabling Act, and federal legislation evidencing Congress' intent "to maintain the tax-exempt status of reservation Indians[.]"⁴⁴ Ultimately, the Court held that, for reasons of federal preemption and tribal sovereignty, state income taxation of a tribal member's income is unlawful when 1) the member lives on tribal lands and 2) the income is "derived wholly from reservation sources."⁴⁵

ii. *Mescalero Apache Tribe v. Jones*

On the same day it handed down the *McClanahan* decision, the Court also decided *Mescalero Apache Tribe v. Jones*.⁴⁶ In *Mescalero*, the Court was presented with state taxation of a tribal enterprise operated outside the reservation.⁴⁷ The Mescalero Apache Tribe owned and operated Sierra Blanca Ski Enterprises, a ski resort located adjacent to the Tribe's reservation in New Mexico.⁴⁸ "The ski area border[ed] on the Tribe's reservation but, with the exception of some cross-country ski trails, no part of the enterprise, its buildings or equipment [was] located within the existing boundaries of the reservation."⁴⁹ Under New Mexico state law, a gross receipts tax was imposed on all businesses operating in the State.⁵⁰ The Tribe paid the gross receipts tax under protest.⁵¹ The Tribe then sought a refund of

⁴³ *Id.* at 173 (quoting *United States v. Kagama*, 118 U.S. 375, 381–82 (1886)) (internal ellipses omitted).

⁴⁴ *Id.* at 176.

⁴⁵ *Id.* at 179.

⁴⁶ Both cases were decided on March 27, 1973.

⁴⁷ *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 146 (1973).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* Additionally, the State also assessed "compensating use" taxes. However, the portion of *Mescalero* addressing this portion of state taxation is inapplicable to *Fond du Lac*, and as such, is beyond the scope of this note.

the taxes paid, but the State Commissioner of Revenue denied the refund.⁵² The state court of appeals affirmed the denial, and the state supreme court denied review.⁵³ The Tribe appealed, and the United States Supreme Court granted review to “consider [the Tribe’s] claim that the income ... of the ski resort [was] not properly subject to state taxation.”⁵⁴

The Court first rejected the Tribe’s contention that “the federal government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise.”⁵⁵ In doing so, the Court recognized that a more nuanced approach, like that of *McClanahan*, which analyzed the “particular treaties and specific federal statutes, including statehood enabling legislation,”⁵⁶ must be utilized to determine whether a state has jurisdiction to subject a tribe, tribal entity, or tribal member to taxation.⁵⁷ However, the Court acknowledged the universality of the *McClanahan* rule, that “absent cession of jurisdiction or other federal statutes permitting it, there [is] no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation.”⁵⁸

The Court determined that *Mescalero* was significantly different from *McClanahan*, as the Tribe’s activity was conducted outside the reservation.⁵⁹ Consequently, the Court held that “[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.”⁶⁰

iii. *McClanahan* and *Mescalero*: A Mostly Useless Framework for State Income Taxation of Tribes, Tribal Entities, and Tribal Members

While the Court in *McClanahan* and *Mescalero* strongly emphasized the importance of an “individualized treatment” that

⁵² *Id.* at 147.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 148.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 148–49.

⁶⁰ *Id.*

analyzes the relevant treaties, statutes, and statehood enabling legislation, these two cases seem to provide a clear framework for lower courts to utilize when determining if a tribe, tribal entity, or tribal member is properly subject to state income taxation. The cases establish a dichotomy. Under *McClanahan*, a state cannot tax tribal activities that occur on the reservation unless specifically authorized by Congress.⁶¹ And under *Mescalero*, a state can tax tribal activities that occur off the reservation unless specifically prohibited by Congress.⁶² However straightforward this framework may seem, it does not provide any guidance for cases falling into the vast expanse between the clean factual scenarios of *McClanahan* and *Mescalero*.

For example, imagine a state taxing a tribal enterprise operated both on and off the reservation. Perhaps this scenario presents an easy solution—the court could simply apportion the activity, allow taxation of the portion occurring off the reservation, and prohibit taxation of the portion occurring on the reservation. However, in *Fond du Lac* the court was presented with a much more difficult situation—state taxation of off-reservation, out-of-state activity by a tribal member. Such a situation implicates both due process concerns and tribal immunity from state taxation issues. Prior to the litigation of *Fond du Lac*, only one other court was presented with a similar question.

C. PURSUASIVE PRECEDENT: LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA v. ZUESKE

In *Lac du Flambeau Band of Lake Superior Chippewa v. Zueske*,⁶³ the Lac du Flambeau Band of Lake Superior Chippewa sought to prevent Wisconsin from imposing state income taxes on its members living on the Band's reservation and receiving income from outside the state.⁶⁴

The case did not present any disputed facts.⁶⁵ The Band's reservation is located entirely within Wisconsin, and the State "initiated tax enforcement proceedings against Harold Jackson, an enrolled member of plaintiff tribe, seeking to recover income taxes it allege[d] Jackson owe[d] on income earned while he was employed as

⁶¹ *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973).

⁶² *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

⁶³ *Lac du Flambeau Band of Lake Superior Chippewa v. Zueske*, 145 F. Supp. 2d 969 (W.D. Wis. 2000).

⁶⁴ *Id.* at 970–71.

⁶⁵ *Id.* at 971.

a truck driver outside the state[.]”⁶⁶ For the tax years at issue, Jackson lived on the Tribe’s reservation and was employed by various trucking and transportation companies in Minnesota and Iowa.⁶⁷ He did not earn any income from employment inside Wisconsin.⁶⁸ After an audit, Wisconsin issued several income tax assessments against Jackson, which he appealed to the Wisconsin Tax Appeals Commission.⁶⁹ Prior to a decision by the Appeals Commission, the district court issued its opinion in the *Lac du Flambeau* case.⁷⁰

The district court quickly determined that the case did not fall squarely within *McClanahan* or *Mescalero*. “Harold Jackson did not earn his income on the reservation, as McClanahan did, and he did not earn it within the state that was trying to tax him, as was the case in *Mescalero Apache Tribe*.”⁷¹ The court found that the case concerned “the state’s authority to tax when its only nexus with the person on which it is imposing the tax is the person’s residence on an Indian reservation located within the state’s boundaries.”⁷²

The Tribe argued that *Mescalero* was confined to instances where Indians go beyond reservation boundaries to conduct business “within the state’s boundaries, in which case the state’s authority [to tax] stems from its general authority to impose non-discriminatory taxes on persons who engage in income-earning activity within its borders.”⁷³ The Tribe further argued that the general due process principle that a state can tax its residents’ worldwide income based on their residency within the state does not apply in the case of Indians who live on reservations within the state; that is, Indians whose permanent residence is on a reservation cannot be taxed solely by nature of their being considered state residents.⁷⁴

The State argued that *Mescalero* applied to all Indians going beyond reservation borders for employment, not just to those that derived income off the reservation within the taxing state.⁷⁵ The State took the position that “Jackson went beyond reservation boundaries to

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 972.

⁷⁰ *Id.* Interestingly, it does not appear that Wisconsin challenged the ripeness of the Band’s case.

⁷¹ *Id.* at 974.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

earn wages and he is a resident of the state; therefore, the state can impose an income tax on him.”⁷⁶

Acknowledging that the case was a close call, the district court recognized that the case involved an intersection of the tribal tax immunity cases and due process considerations.⁷⁷ The district court determined that the Supreme Court’s tribal tax immunity cases established that residency on a reservation within the state is not sufficient to permit taxation.⁷⁸ The court reasoned:

The state may tax persons resident within its borders who do not live on reservations because it has conferred upon these persons the benefit of domicile and its accompanying privileges and advantages. It has not conferred the same benefit upon tribal members residing on reservations, however. The right of tribal members to reside on the reservation derives from treaties entered into by the tribe in the nineteenth century.⁷⁹

The court further determined that if residency on a reservation within the taxing state were a sufficient nexus, the Supreme Court would have come to a different conclusion in *McClanahan*, where the plaintiff conceded that she was, under state law, a resident of Arizona.⁸⁰ Consequently, the court held that this principle prevented Wisconsin from imposing an income tax on Jackson.⁸¹

[I]t is impossible to escape the conclusion that the only basis on which defendant can defend its effort to collect income taxes from Jackson is his residency. It is the only nexus Wisconsin has. But because that residency is on a reservation, the state cannot use it as a nexus. Under due process principles, the state cannot use as a

⁷⁶ *Id.*

⁷⁷ *Id.* at 976.

⁷⁸ *Id.* at 976–77.

⁷⁹ *Id.* at 976.

⁸⁰ *Id.* at 977. See *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 166 n.3 (1973) (stating, “[a]ppellant conceded below that she was a resident within the meaning of the [state income tax] statute[.]”).

⁸¹ *Id.* at 976.

reason to tax a residence that it has not provided or permitted.⁸²

Accordingly, the court declared that reservation residents are not subject to Wisconsin taxation on income earned outside the state.⁸³

III. THE MAJORITY OPINION OF THE EIGHTH CIRCUIT

Due to the similarity between the facts presented in *Lac du Flambeau* and *Fond du Lac*, the implicit question before the Eighth Circuit was whether it would follow the reasoning of the District Court for the Western District of Wisconsin in *Lac du Flambeau*, or whether it would diverge. The Eighth Circuit court clearly chose to take exception with *Lac du Flambeau*, even going so far as to specifically denounce the holding of *Lac du Flambeau*.⁸⁴

The majority of the Eighth Circuit chose to address the due process claim and the tribal tax immunity claim separately. Indeed, the court makes no mention of *McClanahan* or *Mescalero* when addressing the due process claim.⁸⁵

A. THE MAJORITY'S DUE PROCESS REASONING

The court began its due process analysis by setting forth the general due process requirement for state taxation, that it “requires some definite link, some minimum connection between a state and the person, property, or transaction it seeks to tax.”⁸⁶ The court further explained:

[D]omicile or residence [...] is an adequate basis for taxation [...] Since the Fourteenth Amendment makes one a citizen of the state wherein he resides, the fact of residence creates universally reciprocal duties of protection by the state and of allegiance and support by

⁸² *Id.*

⁸³ *Id.* at 977.

⁸⁴ *Fond du Lac Band of Lake Superior Chippewa Indians v. Frans*, 649 F.3d 849, 853 (8th Cir. 2011) (indicating the court’s belief that *Lac du Flambeau* failed to properly apply *Mescalero* and stating, “[t]o the extent *Lac du Flambeau* rests on due process grounds, state citizenship suffices in light of the Fourteenth Amendment and the 1924 Act”).

⁸⁵ *Id.* at 850–51.

⁸⁶ *Id.* at 850 (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992)).

the citizen. The latter obviously includes a duty to pay taxes.⁸⁷

The court then found that members of the Fond du Lac Band are full citizens of the United States and the State of Minnesota as a result of the Fourteenth Amendment and the Indian Citizenship Act of 1924.⁸⁸ While the Indian Citizenship Act⁸⁹ contained the qualification, “the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property,” the court determined that this language existed merely to allow Indians to keep “their pre-existing right to tribal and other property. The proviso does not create a tax exemption.”⁹⁰ The court therefore concluded that state citizenship “provides a constitutional nexus” and satisfied due process considerations.⁹¹

B. THE MAJORITY’S TRIBAL IMMUNITY FROM STATE TAXATION REASONING

The court plainly stated that “the facts [in *Fond du Lac*] lie between *McClanahan*, involving only on-reservation activity, and *Mescalero Apache Tribe*, involving operation of a ski resort within the taxing state but off the reservation.”⁹² However, the court proceeded to apply only *Mescalero* as controlling.⁹³ The court held that *McClanahan* is limited to activity wholly conducted on reservation, while it expanded *Mescalero* to off-reservation, out-of-state activity.⁹⁴ The court stated that it is “not free to limit Supreme Court opinions precisely to the facts of each case. Instead, federal courts are bound by the Supreme Court’s considered dicta almost as firmly as by the Court’s outright holdings.”⁹⁵ The court concluded that *Mescalero* controlled, as Diver worked off the reservation when he earned his pension.⁹⁶ Because of this, the majority held that the state may

⁸⁷ *Id.* at 851 (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344–45 (1954)).

⁸⁸ *Id.*

⁸⁹ Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b)).

⁹⁰ *Fond du Lac Band of Lake Superior Chippewa Indians v. Frans*, 649 F.3d 849, 851 (8th Cir. 2011)

⁹¹ *Id.*

⁹² *Id.* at 852.

⁹³ *Id.* at 853.

⁹⁴ *Id.*

⁹⁵ *Id.* at 852 (quoting *Jones v. St. Paul Cos.*, 495 F.3d 888, 893 (8th Cir. 2007)).

⁹⁶ *Id.* at 853.

properly impose an income tax on a tribal member's income that is earned off the reservation and out of the taxing state.⁹⁷

IV. THE DISSENT

The dissent, authored by Circuit Judge Diana Murphy, argued that the majority “failed to give full consideration to all relevant Supreme Court precedent and other authority[.]”⁹⁸ Judge Murphy argued that the right of the Band to occupy their reservation exists separate from the rights of other Minnesotans. “Unlike other Minnesota citizens, Band members’ rights of occupancy derive from [the Treaty with the Chippewa, which was enacted by Congress four years prior to Minnesota becoming a state,] not from the state.”⁹⁹ Judge Murphy stated that when Congress passed the Indian Citizenship Act of 1924, it “decoupled Indians’ taxation status from their citizenship, and [established that] a state may not deny an on reservation tribal member voting rights and equal protection even if that member does not pay state taxes.”¹⁰⁰ Judge Murphy cited *Goodluck v. Apache County* for authority that Congress “extend[ed] citizenship to Indians without increasing states’ ability to tax them.”¹⁰¹

In *Goodluck*, a three judge panel of the District Court for the District of Arizona determined that even though the Navajo Indians in Apache County were immune from state taxation, they were entitled to be counted for voting apportionment purposes.¹⁰² The panel held that the Indian Citizenship Act of 1924 was within the authority of Congress and that “[i]t is much too strict a reading of the Constitution to require subjection to state taxes before citizenship may be granted.”¹⁰³ Critically, while the Court did not issue an opinion in the case, the United States Supreme Court affirmed the panel’s opinion.¹⁰⁴

Judge Murphy pointed out the majority’s error in relying upon *Shakopee Mdewakanton Sioux Community v. City of Prior Lake*,

⁹⁷ *Id.*

⁹⁸ *Id.* (Murphy, J., dissenting).

⁹⁹ *Id.* at 854 (citing *United States v. Thomas*, 151 U.S. 577, 582–85 (1894)).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 854–55 (citing *Goodluck v. Apache County*, 417 F.Supp. 13 (D. Ariz. 1975), *aff’d sub nom.* *Apache County et al. v. United States*, 429 U.S. 876 (1976)).

¹⁰² *Goodluck v. Apache County*, 417 F.Supp. 13, 16 (D. Ariz. 1975), *aff’d sub nom.* *Apache County et al. v. United States*, 429 U.S. 876 (1976).

¹⁰³ *Id.* at 16.

¹⁰⁴ *Apache County et al. v. United States*, 429 U.S. 876 (1976).

*Minnesota*¹⁰⁵ “for the proposition that ‘band members living on the reservation now hold full Minnesota citizenship[.]’”¹⁰⁶ Judge Murphy explained that in *Shakopee*, the Eighth Circuit held that “Shakopee reservation residents would be entitled to the benefit of citizenship in Prior Lake even though the city could not subject Reservation residents to municipal taxes or ordinances.”¹⁰⁷ Judge Murphy argued that the majority’s opinion was inconsistent with the “principles enunciated in *Shakopee*[.]”¹⁰⁸

Judge Murphy recognized that *Fond du Lac* is not determined by either *McClanahan* or *Mescalero*, and also criticized the majority for making the same observation while it “would limit *McClanahan* to its facts while overlooking the significant distinction between Diver’s income and the income taxed in *Mescalero* where the tribe was operating a lucrative business off the reservation but within the taxing state.”¹⁰⁹ Further, Judge Murphy noted that the Supreme Court “explicitly characterized *Mescalero* as applying to within state activity” in *Kiowa Tribe v. Manufacturing Technologies, Inc.*¹¹⁰ *Kiowa Tribe* “cited *Mescalero* for the principle that a state ‘may tax ... tribal activities occurring *within the State* but outside Indian country.”¹¹¹

Finally, Judge Murphy described the *Lac du Flambeau* case and concluded that the court in that case “did what should be done here, for it considered how due process tax doctrine and federal Indian law interact rather than viewing each in isolation.”¹¹² Judge Murphy concluded that by applying due process and Indian law together, the result should have been to prohibit Minnesota’s imposition of income tax on Diver’s pension income.¹¹³

¹⁰⁵ *Shakopee Mdewakanton Sioux Community v. City of Prior Lake, Minnesota*, 771 F.2d 1153 (8th Cir. 1985).

¹⁰⁶ *Fond du Lac Band of Lake Superior Chippewa Indians v. Frans*, 649 F.3d 849, 855 (8th Cir. 2011) (Murphy, J., dissenting) (quoting *id.* at 851 (majority opinion)).

¹⁰⁷ *Id.* at 855 (Murphy, J. dissenting) (quoting *Shakopee*, 771 F.2d 1153, 1157–59 (8th Cir. 1985) (internal quotations omitted)).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 855–56.

¹¹⁰ *Id.* at 856.

¹¹¹ *Id.* at 856 (quoting *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 755 (1998)) (emphasis is that of the dissent).

¹¹² *Id.*

¹¹³ *Id.*

V. ARGUMENT

This section of the note identifies a key mistake in the majority opinion and provides additional support for the dissent's position. It argues that the majority should have adopted the analysis of Judge Murphy's dissent. The section analyses the Indian Citizenship Act of 1924 and posits that the Act decoupled Indians' tax status from their citizenship, as argued by the dissent. The section also discusses a recent Supreme Court decision that provides additional commentary on the scope of *Mescalero*, which undermines the majority's rule that a state may tax all off-reservation income, regardless of whether it was earned in the taxing state.

A. CONTRARY TO THE MAJORITY'S OPINION, THE INDIAN CITIZENSHIP ACT OF 1924 DECOUPLED INDIANS' TAXATION STATUS FROM THEIR CITIZENSHIP

The majority responded to the dissent's argument that the Indian Citizenship Act of 1924 "decoupled¹¹⁴ Indians' taxation status from their citizenship," and claimed that the "history of Native American citizenship reveals a different Congressional intent."¹¹⁵ The majority argued that by including the limitation, "the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property,"¹¹⁶ Congress merely intended that tribal members not be required to "abandon their tribal connections."¹¹⁷ The majority argued that *Elk v. Wilkins*¹¹⁸ and *Oakes v. United States*,¹¹⁹ which addressed pre-1924 Indian naturalization legislation, explain this Congressional intent.¹²⁰ The majority did not offer any other authority to support its contention.¹²¹ The majority

¹¹⁴ In this context, "decoupled" refers to separating Indians' citizenship from the government's ability to tax them. If decoupled, it is possible for Indians to be granted citizenship without being subjected to state taxation.

¹¹⁵ *Id.* at 851.

¹¹⁶ *Id.* (quoting Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b)).

¹¹⁷ *Id.* at 851.

¹¹⁸ *Elk v. Wilkins*, 112 U.S. 94 (1884).

¹¹⁹ *Oakes v. United States*, 172 F. 305 (8th Cir. 1909).

¹²⁰ *Fond du Lac Band of Lake Superior Chippewa Indians v. Frans*, 649 F.3d 849, 851 (8th Cir. 2011).

¹²¹ *See id.*

solely relied on these cases from 1884 and 1909, respectively, to support its finding of legislative intent of an act of Congress that occurred in 1924. While *Oakes v. United States* addressed identical language that had been included in a previous naturalization statute, this language is of no consequence in determining whether the Indian Citizenship Act decoupled Indians' taxation status from their citizenship. A detailed analysis of *Goodluck v. Apache County*¹²² indicates that the simple grant of citizenship by the Indian Citizenship Act of 1924, rather than the tribal property proviso, decoupled Indians' tax status from their citizenship.

In *Oakes v. United States*, the Eighth Circuit interpreted language contained in Section 6 of the General Allotment Act of 1887.¹²³ The General Allotment Act of 1887 provided:

[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, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.¹²⁴

The *Oakes* court determined that the purpose of this language was to allow Indians that had decided to “civilize” to retain their rights to tribal property, “as to place individual Indians who have abandoned tribal relations, once existing, and have adopted the customs, habits, and manners of civilized life, upon the same footing, in that regard, as though they had maintained their tribal relations.”¹²⁵

Of course, the true purpose of such legislation was “breaking up and destroying the Indian tribal relation, and inducing Indians to

¹²² *Goodluck v. Apache County*, 417 F.Supp. 13, 14 (D. Ariz. 1975), *aff'd sub nom.* *Apache County et al. v. United States*, 429 U.S. 876 (1976).

¹²³ *Oakes v. United States*, 172 F. 305, 308 (8th Cir. 1909).

¹²⁴ *Id.* (quoting Act of Feb. 8, 1887, ch. 119, 24 Stat. 388, §6).

¹²⁵ *Id.* at 308–09.

adopt the habits of a civilized life,”¹²⁶ promising that if they did so, Indians would gain the benefits of being citizens, while retaining all claims to tribal property that they would have had as tribal members.¹²⁷ In becoming “civilized,” the Indians would “have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside[.]”¹²⁸ In essence, by ceasing to be Indian, they would become full citizens of the United States and their state of residence. However, this approach to “civilizing” the Indians failed, as evidenced when Congress granted Indians full citizenship in 1924 without first requiring that they subject themselves to the laws of the state.¹²⁹

The *Fond du Lac* majority was correct in determining that the language, “the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property” in the Indian Citizenship Act did not decouple Indians’ tax immunity from their citizenship because this language is not an exemption to state taxation. Rather though, it was the grant of citizenship itself by the Act, not the tribal property proviso, that resulted in a decoupling of citizenship from taxation status. The majority failed to consider the effect of the grant of citizenship itself.

Goodluck did not mention the tribal property proviso of the Indian Citizenship Act.¹³⁰ Instead, it discussed the general requirements for citizenship.¹³¹ Noting that “[t]he phrase ‘not taxed’ as used in the second section of the Fourteenth Amendment is an historical anomaly which is of no relevance today[.]”¹³² the court determined that at the time of adoption of the Fourteenth Amendment, “taxation was the equivalent to being considered a citizen.”¹³³ However, “[n]owhere does the Constitution define the requirements necessary for citizenship. The granting of citizenship by Congress in 8

¹²⁶ United States ex rel. Kadrie et al. v. West, 30 F.2d 989, 992 (D.C. Cir. 1929), *rev’d sub nom.* Wilbur v. United States ex rel. Kadre et al., 281 U.S. 206 (1930). However, in reversing the Eighth Circuit, the Court remarked, “the purpose was to accomplish ... [a] transition from the tribal relation and dependent wardship to full emancipation and individual responsibility[.]” *Wilbur*, 281 U.S. at 221.

¹²⁷ *Id.*

¹²⁸ Act of Feb. 8, 1887, ch. 119, 24 Stat. 388, §6.

¹²⁹ Act of June 2, 1924, ch.233, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b)).

¹³⁰ *Goodluck v. Apache County*, 417 F.Supp. 13 (D. Ariz. 1975), *aff’d sub nom.* Apache County et al. v. United States, 429 U.S. 876 (1976).

¹³¹ *Id.* at 16.

¹³² *Id.*

¹³³ *Id.*

U.S.C. § 1401 recognizes that the Indian now is subject to federal jurisdiction and many federal taxes.”¹³⁴ And, under Section 1 of the Fourteenth Amendment, all citizens of the United States are citizens of the “State wherein they reside.”¹³⁵ Ultimately, *Goodluck* held that an Indian can be a citizen of a state without paying taxes, a holding that was affirmed by the United States Supreme Court.¹³⁶ This holding necessitates a decoupled view of citizenship and taxation.

The position that the Indian Citizenship Act decoupled Indians’ taxation status from their citizenship is bolstered by numerous Supreme Court decisions. As has been generally noted, “[s]tate and federal ‘citizenship,’ however, does not affect claims to sovereignty and jurisdictional authority of tribal governments.”¹³⁷ Indeed, “if residence on a reservation were equivalent to residence within a state [for taxation purposes], a state could claim authority to collect a tax merely by showing that a tribal member lived on a reservation within the state borders.”¹³⁸ But, as the *Lac du Flambeau* court notes, if that were correct, “the Supreme Court would not have barred the states of Arizona, Montana, and Washington from imposing taxes on reservation Indians within their states” in *McClanahan*, *Moe*, and *Colville*.¹³⁹

Fond du Lac rests upon the erroneous conclusion that, for due process considerations, a tribal resident’s state citizenship permits state taxation of his income. However, when the Supreme Court affirmed *Goodluck*, it established that state citizenship and subjection to state taxation are not a unitary consideration. The *Fond du Lac* majority should have recognized this principle and held that it is a violation of due process for a tribal resident to be subject to state taxation solely by reason of that person’s residence on a reservation within the taxing state.

¹³⁴ *Id.*

¹³⁵ U.S. CONST. amend. XIV, § 1.

¹³⁶ *Goodluck v. Apache County*, 417 F.Supp. 13, 16 (D. Ariz. 1975), *aff’d sub nom.* *Apache County et al. v. United States*, 429 U.S. 876 (1976).

¹³⁷ WILLIAM D. RICH, 2 *Modern Constitutional Law* § 24:4 (3d ed.).

¹³⁸ *Lac du Flambeau Band of Lake Superior Chippewa v. Zueske*, 145 F. Supp. 2d 969, 977 (W.D. Wis. 2000).

¹³⁹ *Id.* (citing *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164 (1973), *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), and *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980)).

**B. MICHIGAN V. BAY MILLS INDIAN COMMUNITY
FURTHER SUPPORTS THE DISSENT’S POSITION
THAT *MESCALERO* IS LIMITED TO ACTIVITY
CONDUCTED *WITHIN* THE TAXING STATE**

In her dissent, Judge Murphy cited *Kiowa Tribe of Oklahoma v. Manufacturing Technologies* to point out that the Supreme Court took a narrower view of *Mescalero* than the majority applied in *Fond du Lac*.¹⁴⁰ Judge Murphy argued that *Kiowa* clearly indicated that *Mescalero* applied only when activities were conducted off-reservation and *within* the taxing state.¹⁴¹ Since the decision in *Fond du Lac*, the Supreme Court has provided additional commentary regarding its holding in *Mescalero*, which further supports Judge Murphy’s position.

In *Michigan v. Bay Mills Indian Community*, the Court addressed whether tribal sovereign immunity bars a state from seeking to enjoin a tribe from operating an off-reservation casino in violation of a tribal-state compact.¹⁴² The case garnered a majority opinion, a concurring opinion, and three dissenting opinions.¹⁴³ Both Justice Kagan’s majority opinion and Justice Thomas’s dissent, in which Justices Scalia, Ginsburg, and Alito joined, provide helpful commentary on *Mescalero*.

Justice Kagan wrote: “[A] State, *on its own lands*, has many other powers over tribal gaming that it does not possess (absent consent) in Indian territory. Unless federal law provides differently, ‘Indians going beyond reservation boundaries’ are subject to any generally applicable state law.”¹⁴⁴ Importantly, Justice Kagan noted that a state’s powers are heightened when regulating Indian gaming “*on its own lands*” rather than on tribal land. This language supports the exact position that Judge Murphy took in her dissent—*Mescalero* only applies when the state is attempting to regulate off-reservation activity that is occurring within the state.

Further, Justice Thomas clearly explained in his dissent the rationale for the *Mescalero* holding. He wrote:

¹⁴⁰ *Fond du Lac Band of Lake Superior Chippewa Indians v. Frans*, 649 F.3d 849, 856 (8th Cir. 2011) (Murphy, J., dissenting).

¹⁴¹ *Id.*

¹⁴² *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2028–29 (2014).

¹⁴³ *Id.* at 2028.

¹⁴⁴ *Id.* at 2034 (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)) (emphasis added).

When an Indian tribe engages in commercial activity outside its own territory, it necessarily acts within the territory of a sovereign State. This is why, “[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.”¹⁴⁵

Justice Thomas’s dissent argued against “[a] rule barring all suits against a tribe arising out of a tribe’s conduct within state territory[.]”¹⁴⁶

These passages indicate the true scope of *Mescalero*—when a tribe, tribal entity, or tribal member conducts commercial activity outside the reservation boundaries, the state may tax the activity to the extent that the activity is conducted within the state. However, *Mescalero* only goes that far; if the activity is conducted in another state, the taxing state lacks the jurisdiction to tax. Absent contrary law, the other state would obviously have the authority to tax that activity, as it is being conducted *within its territory*, but a state may not tax a tribal member’s income solely because it was earned off the reservation in another state.

VI. IMPACT OF *FOND DU LAC* ON TRIBAL AFFAIRS

This section briefly discusses the impact the *Fond du Lac* decision will have on tribal affairs if the majority opinion is left uncorrected.

First, tribal members will be subjected to state taxation without benefitting from the state’s expenditure of the taxes. As a result of the *Fond du Lac* decision, Jackson now pays Minnesota income taxes on his pension income.¹⁴⁷ However, given that he lives on the Fond du Lac reservation, he will not see any of the benefits of the taxation. The state will spend Jackson’s tax dollars educating its children, providing healthcare for its citizens, improving state infrastructure, and paying

¹⁴⁵ *Michigan*, 134 S.Ct. at 2047 (2014) (Thomas, J., dissenting).

¹⁴⁶ *Id.*

¹⁴⁷ *Fond du Lac Band of Lake Superior Chippewa Indians v. Frans*, 649 F.3d 849, 853 (8th Cir. 2011).

pensions for its employees.¹⁴⁸ The income taxes Jackson pays on his pension income will be a windfall profit for Minnesota for which Jackson will see no return.¹⁴⁹

Second, state taxation of out-of-state, off-reservation pension income results in a reduction of the tribal tax base and may result in treble taxation. By taxing out-of-state, off-reservation tribal member income, the states are necessarily reducing the pot of money available for tribal taxation—every dollar paid to the state is a dollar less that the tribe can collect. While tribes have avoided imposing income taxes on their members because of widespread poverty,¹⁵⁰ this does not negate the point that state taxation further decreases the viability of tribal income tax schemes by reducing the tax base. Additionally, if a tribe were to establish a tribal income tax, tribal members receiving out-of-state, off-reservation pension income would be subject to treble taxation: federal, state, and tribal.

Finally, state taxation of out-of-state, off-reservation pension income discourages tribal members from returning to tribal lands. Some tribal members that have left the reservation to earn a living may be discouraged from returning to the reservation if they will be subject to state taxation of their pension income. For example, imagine a member of the Pueblo of Acoma in New Mexico moves to the Permian Basin region of Texas to work in the oil fields. This tribal member works in Texas and eventually retires with pension benefits. Upon retirement, the tribal member would face a difficult decision: he could remain in Texas and collect his pension income free of state taxation (Texas does not have a state personal income tax), or he could return

¹⁴⁸ MINNESOTA MGMT. AND BUDGET, STATE BUDGET AT A GLANCE: A 3 MINUTE GUIDE TO THE MINNESOTA STATE BUDGET (2014), <http://www.mn.gov/mmb/budget/state-budget-overview/threeminutes/>.

¹⁴⁹ Even though states provide some monies to tribes, these amounts are wholly offset by sales taxes paid by tribal members. “On most reservations, there are few retail stores and tribal members go off reservation and pay state [sales] taxes on everything they buy. Nationwide, this amounts to \$246 million annually in tax revenues to state governments, while states expend only \$226 million annually on behalf of reservation residents.” Mark 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, 146 (quoting Tax Fairness and Tax Base Protection: Hearing on H.R. 1168 Before the House Comm. on Resources, 105th Cong. (testimony of W. Ron Allen, President, National Congress of American Indians)). In short, the sales taxes paid by tribal members on off-reservation purchases more than covers the total amount of funds expended by states on reservation residents.

¹⁵⁰ *Id.* at 103-04.

to the Pueblo and be subject to New Mexico's personal income tax.¹⁵¹ While tax considerations are probably not a determining factor when an individual is considering moving back to their cultural homeland, additional taxes could have an impact on the decision and deter tribal members from returning to their reservations.

Even though the *Fond du Lac* decision applies only to the small number of tribal members who leave the state to seek off-reservation employment and later return to their reservation, the impacts of the decision are wholly negative for tribes and tribal members, whereas the state is allowed a windfall—it can collect tax revenues without having to provide any additional services.

CONCLUSION

The legal framework for taxation of tribal members' off-reservation, out-of-state income is exceedingly complicated. It implicates both due process and federal Indian law concerns, which on their own are difficult areas of law. This complexity demands that courts take exceptional care to explain and justify their conclusions. Unfortunately, this was not the course taken by the majority in *Fond du Lac*. Rather, the court disposed of the Tribe's due process and tribal immunity from state taxation claims in an exceptionally brief opinion and consequently made mistakes. The dissent provided the correct analysis of both the due process clause analysis and the limitations of *Mescalero*.

The reason for the difficult decisions in *Fond du Lac* and *Lac du Flambeau* is the Supreme Court's lack of guidance on the issue of state taxation of tribal member's income. *McClanahan* and *Mescalero* provide the two ends of the spectrum, but they do not provide any guidance for cases that do not fit neatly within the scope of one or the other. While the issues presented in *Fond du Lac* and *Lac du Flambeau* are fairly rare, the cases present an adequately substantive and complicated legal question to merit serious review by the Court.

¹⁵¹ This example is merely used for illustrative purposes. To date, the holding of the *Fond du Lac* decision has not been expanded beyond the bounds of the Eighth Circuit.