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# FROM ZERO-SUM TO ECONOMIC PARTNERS: REFRAMING STATE TAX POLICIES IN INDIAN COUNTRY IN THE POST-COVID ECONOMY

Pippa Browde\*

## ABSTRACT

*The disparate impact COVID-19 has had on Indian Country reveals problems centuries in the making from the legacy of colonialism. One of those problems is state encroachment in Indian Country, including attempts to assert taxing authority within Indian Country. The issue of the reaches of state taxing authority in Indian Country has resulted in law that is both uncertain and highly complex, chilling both outside investment and economic development for tribes.*

*As the United States emerges from COVID-19, to focus only on the toll exacted on tribes and their peoples ignores the tremendous opportunities for states to right these historical wrongs. Buoyed by federal COVID-relief funds, state and local governments are in a financial position to reframe their tax policies to promote tribal sovereignty and support economic development in Indian Country.*

*This article argues for states to make diplomatic, responsible state*

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\* Professor of Law at the Alexander Blewett III School of Law at the University of Montana. The University of Montana is located on the traditional lands of Indigenous peoples, including the Séliš, Ksanka, and Qlispé. Many others, including Blackfeet, Nez Perce, Shoshone, Bannock and Coeur D'Alene, had and continue to have a presence in the area. The author and the University of Montana acknowledges the role the legal system has played in the removal of Indigenous peoples from these lands, and, through commitment to education, service, and scholarship, strive to improve the quality of justice for future generations. Doing so demands respect for tribal sovereignty and Indigenous cultures as well as accountability to the needs and perspectives of Indigenous people, who, from time immemorial to the present and until the end of time, protect and remain connected with this land.

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The author dedicates this article to the memory of Professor Fred Hart. Professor Hart was an inspiring mentor who lived a life committed to serving others. He championed the cause of a more diverse and inclusive legal profession, and his legacy will live on through the many lives he touched.

*and local tax policies that will create healthier intergovernmental relationships and an environment that in turn creates broader economic growth for tribes and states alike. Through policies requiring state governments to consult with tribes to make joint decisions on tax policy and by refraining from exercising taxing authority in Indian Country, states can move from a zero-sum game. Instead of competing for precious tax revenue, state and local governments can partner with tribes to expand the total amount of available revenue streams. Doing so will not just right the historical wrongs of colonialism—it could also help prevent future crises, such as the COVID-19 pandemic, from having such a disparate impact on tribes again.*

## I. INTRODUCTION

States have been attempting to assert jurisdiction in Indian Country since the time of the nation’s founding, setting up the historical enmity between tribes and states, often referred to as the “deadliest enemies.”<sup>1</sup> Such encroachment by states has only increased over time.<sup>2</sup> This jurisdictional encroachment has been particularly contentious in the area of taxation.<sup>3</sup>

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1. The phrase describing the hostility between Tribal governments and the states as “deadliest enemies,” is from *United States v. Kagama*, 118 U.S. 375, 384 (1886).

A note on terminology for readers unfamiliar with terms common in Indian law. The terms “Indian tribe,” “tribe,” and “Indian nation” refer to “a group of Indians that is recognized as constituting a distinct and historically continuous political entity for at least some governmental purposes.” WILLIAM C. CANBY JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 4 (5th ed. 2015).

“Indian country,” as defined by federal statute, “means (a) all land within the limits of any Indian reservation . . . including right-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.” 18 U.S.C. § 1151. This definition is for purposes of criminal law, but it also applies to describe the land described in this article.

There is no universal definition of who counts as “Native American Indian,” or “Indian.” FELIX S. COHEN, *COHEN’S HANDBOOK OF FEDERAL INDIAN LAW* 171 (Nell Jessop Newton ed. 2012). For purposes of this article, such terms describe a person or people of indigenous American ancestry who are recognized by “the individual’s tribe or community.” *Id.* The term “non-member Indian” refers to Native American Indians who are not members of a governing tribe. *Id.* at 712 & n.158, 731 & n.1. For purposes of the doctrine involving state taxation in Indian Country, non-member Indians are treated as non-Indians when engaged in transactions within the Tribal territories to which the non-member is not affiliated. *Id.* at 731–33 (“Most courts treat Indians who are not members of the governing tribe the same as non-Indians for the purposes of concurrent state taxing authority in Indian country. . . . There remain reasons to criticize this approach.”).

The history of state attempts to assert power in Indian Country beginning with the cases referred to as the “Marshall Trilogy” are explained in Part II.A, *infra* note 26 and accompanying text.

2. See Part II.A *infra* notes 35–40 and accompanying text for explanation on how termination-era policies led to an expansion of state authority within Indian Country.

3. See Matthew L.M. Fletcher, *Retiring the ‘Deadliest Enemies’ Model of Tribal-State Relations*, 43 *TULSA L. REV.* 73, 78 (2007) (“Until recent years, tribal and state interest competed in a vigorous (and often vicious) zero-sum game of civil regulation, taxation, and criminal jurisdiction.”). The problem has been categorized as competition for revenue. See Russel Lawrence Barsh, *Issues in Federal, State, and Tribal Taxation of Reservation Wealth: A Survey and Economic Critique*, 54 *WASH. L. REV.* 531, 533

Supreme Court jurisprudence has gradually eroded a tribe's ability to tax within its geo-political territory while at the same time expanding the potential for states and local governments to tax non-Indians engaged in business within Indian Country.<sup>4</sup> Questions of taxation in Indian Country are answered by law that is both complex and highly uncertain. Uncertainty as to applicable tax law in Indian Country has several negative collateral consequences as a practical matter.<sup>5</sup> Outside investors may be reluctant to do business deals in Indian Country if the tax consequences are uncertain or overly burdensome.<sup>6</sup> When a state has overlapping taxing authority (or even the possibility of such authority), tribes must choose between imposing a tax and attracting the investment. At the core, these problems impair a tribe's ability to raise revenue and self-govern, thereby reducing tribal sovereignty.<sup>7</sup>

Calls for reform in this area are not new. Tribes, scholars, and practitioners have been advocating for the curtailing of state taxing authority in Indian Country to alleviate the collateral consequences described above for years.<sup>8</sup> There is renewed urgency for tribal taxation as a tool to promote tribal sovereignty. Most visibly, the COVID-19 pandemic laid bare the problems, both economic and otherwise, that arise from centuries of abuse that federal and state governments have inflicted upon tribal governments.<sup>9</sup> Tribal business enterprises—many of which focus on tourism, hospitality, and gaming—have been closed or restricted in operation throughout the pandemic. This has resulted in “the almost total drying up of business revenue-dependent tribal budgets.”<sup>10</sup>

In addition to the economic conditions created by the pandemic, there is a global reckoning for racial and social justice for historically marginalized peoples. For Native American Indians and Indian tribes, this requires reckoning with the historical and continued injustices of colonialism, one of the two original sins of the

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(1979) (noting the strain on state and local government budgets and impact of strain on competition for tax revenue within tribal territories).

4. See Part II.B.1.a *infra* notes 55–59 and accompanying text (explaining law limiting tribal taxation within territorial boundaries); Part II.B.2 *infra* notes 65–69 and accompanying text (explaining expansion of reaches of state taxation within Indian Country).

5. See Part II.B.3 *infra*.

6. See *id.*

7. Matthew L. M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759 (2004); Adam Creppelle, *Taxes, Theft and Indian Tribes: Seeking an Equitable Solution to State Taxation of Indian Country Commerce*, 122 W. VA. L. REV. 999 (2020).

8. Fletcher, *supra* note 7, at 800–05; Mark J. Cowan, *Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Protecting Tribal Governmental Revenues*, 2 PITT. TAX REV. 93 (2005); Scott A. Taylor, *A Judicial Framework for Applying Supreme Court Jurisprudence to the State Income Taxation of Indian Traders*, 2007 MICH. ST. L. REV. 841 (2007). Most recently, see Creppelle, *supra* note 7.

9. This necessarily implicates the federal government's failure to meet its trust obligations with respect to Indian tribes. For explanation on relevant history, see Part II.A *infra* note 43 and accompanying text. For analysis of how the federal government failed to meet its obligation, see Part III *infra* notes 172–176 and accompanying text. The COVID-19 Pandemic has also prompted Indian law scholars to call for an expansion of tribal regulatory authority more generally than just taxation within Indian Country. See Katherine Florey, *Toward Tribal Regulatory Sovereignty in the Wake of the COVID-19 Pandemic*, 63 ARIZ. L. REV. 399 (2021).

10. SAHIR DOSHI, ALLISON JORDAN, KATE KELLY & DANYELLE SOLOMON, *THE COVID-19 RESPONSE IN INDIAN COUNTRY: A FEDERAL FAILURE I* (2020).

United States. Such reckoning offers lessons on the value of sovereignty or power to tribal governments.<sup>11</sup> Professor Maggie Blackhawk provides a framework for addressing the legacy of colonialism by promoting tribal sovereignty through the distribution and limits of governmental powers among the federal, state, and tribal sovereigns.<sup>12</sup> She notes how federal judicial doctrine has not been an effective tool for promoting sovereignty.<sup>13</sup> Tribes have had more success through executive policy-making and Congressional action.<sup>14</sup>

How can tribes achieve the sovereignty they need to heal, sustain, and grow? Tribal governments must be free from state encroachment, economic and otherwise. Most of the literature has called for a federal preemptive solution, be it legislative or judicial, to the problems of state encroachment in the field of taxation.<sup>15</sup> A federal legislative preemption of state tax in Indian Country would be effective, but it has not come to pass and it is politically unrealistic to expect it will anytime soon.<sup>16</sup> This article offers an alternative approach: it argues for states to make diplomatic, responsible state and local tax policies that promote tribal sovereignty.<sup>17</sup> Such tax policies will create healthier intergovernmental relationships and an environment that, in turn, creates broader economic growth for tribes and states alike.

States can help promote tribal self-governance and sovereignty through institutional policies that require meaningful, government-to-government consultation. States can take a further step to correct problems of multi-jurisdictional tax in Indian Country. In cases where a state may have overlapping jurisdiction over transactions involving non-Indians, states may refrain from taxation.<sup>18</sup> And in cases in which a tribe lacks taxing authority over non-Indians transacting within Indian Country, a state can impose a tax similar to tribal taxes to create a uniform taxing

11. Matthew L. M. Fletcher, *Indian Lives Matter: Pandemics and Inherent Tribal Powers*, 73 STAN. L. REV. ONLINE 38 (2020) (arguing for tribal regulatory authority over non-Indians during a pandemic); Maggie Blackhawk, *Federal Indian Law as Paradigm within Public Law*, 132 HARV. L. REV. 1787, 1793, 1800 (2019) (arguing that the history of colonialism and the “violent dispossession of Native lands, resources, culture, and even children offers different, yet equally important, lessons about how to distribute and limit government power.” She further argues that “[t]he word ‘slavery,’ like the word ‘colonialism,’ appears nowhere in the Constitution. Yet, like American other original sin, traces of colonialism are woven in like threads to the fabric of the document.”).

12. Blackhawk, *supra* note 11, at 1797–99 (distinguishing from “rights-based” legal frameworks that addressed legacies of slavery and Jim Crow policies from “power-based” legal frameworks that are adequate to address the legacies of colonialism).

13. Blackhawk, *supra* note 11, at 1799 (“Throughout the twentieth century, it has often been Congress and the Executive – and the ability to access the lawmaking process through petitioning and lobbying – rather than the courts, that have provided sanctuary [for tribes].”).

14. *Id.*

15. See, e.g., Cowan, *supra* note 8 (positing federal solutions including congressional action, federal tax incentives, or other incentives to resolve double tax problem). Professor Cowan catalogues a number of scholarly articles addressing federal proposals. Cowan, *supra* note 8, at 97 n. 26. See also Taylor, *supra* note 8 (arguing for a “logical and unified” preemption approach by Congress to state income tax on Indian traders).

16. See generally Blackhawk, *supra* note 11, at 1793.

17. This is not the first article to argue for collaborative relationship building between states and tribes. See Matthew L.M. Fletcher, *Retiring the ‘Deadliest Enemies’ Model of Tribal-State Relations*, 43 TULSA L. REV. 73 (2007).

18. See Part II.B.2 *infra* for the law and types of cases in which this conflict arises.

regime.<sup>19</sup> Moving from a zero-sum game in which states force tribes to compete for precious tax revenue towards a strategy of states and tribes becoming economic partners to expand the total amount of available revenue streams could help prevent future crises, such as the COVID-19 pandemic, from having such a disparate impact on tribes again.

This article proceeds as follows: Part II explains the historical context and overview of jurisdictional issues regarding state and tribal taxation in Indian Country and the impact those rules have on economic development in Indian Country. Part II also provides data on the effects of the COVID-19 pandemic in Indian Country and connects the current reckoning for racial justice in the United States to the calls for meaningful tribal sovereignty. Part III contains an analysis of how states and local governments can help support tribal sovereignty, why doing so will promote economic growth in Indian Country and the broader region, and how choosing to promote tribal sovereignty can help repair the recent devastation caused by COVID-19 and heal the wounds of historical enmity. Part IV concludes.

## II. BACKGROUND

This part provides background on the history of federal Indian law and policy relevant to the jurisdictional dispute between tribes and states over taxing authority in Indian Country. It then explains the jurisprudence and doctrines of taxing authorities in Indian Country as between states (and local governments) and tribes. It also provides data on the COVID-19 pandemic and the disparate impact the pandemic has had on tribes and Native American Indian populations, both in terms of health and economic outcomes. The disparate impact borne by tribes reflects the history and legacy of colonialist policies. Finally, this part looks at the impact of the COVID-19 pandemic in Indian Country and tribal desire for meaningful sovereignty in the context of calling for reconciliation of the history and legacy of colonialism.

### A. Historical background of law and policy in Indian Country is the foundation for state encroachment on tribal sovereignty.

The disparate health and economic impacts of the COVID-19 pandemic in Indian Country are nothing new.<sup>20</sup> Rather, the consequences of the pandemic felt by tribes and their peoples are the result of over 400 years of oppressive policies imposed on tribes.<sup>21</sup> Until recent decades, these policies reflected only federal priorities and amounted to dynamic vacillations of the federal government's interpretation of the obligation to protect "tribes and their properties, including

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19. See Part II.B.1.a. *infra* notes 55–59 and accompanying text for more on this particular type of problem.

20. See Fletcher, *supra* note 11, at 38 ("American Indian people know all too well the impact of pandemics on human populations, having barely survived smallpox outbreaks and other diseases transmitted during the generations of early contact between themselves and Europeans.").

21. It is impossible to provide 400 years' worth of history on the relationship between tribes and the federal government in an article of this size. See CANBY, *supra* note 1, at 13–34, for a succinct but excellent overview of the history of the specific policies of the federal government regarding Native American Indian tribes.

protection from encroachments by the states and their citizens.”<sup>22</sup> Because the current situation in Indian Country reflects the historical events that led to this point, it is important to understand those events.

From time immemorial, Indian tribes existed as full sovereigns.<sup>23</sup> Early in the United States’ history, recognizing that tribes were governments with sovereignty, the federal government negotiated treaties with tribes.<sup>24</sup> At first, the federal government exercised its plenary power with respect to transactions with Indian tribes, prohibiting states from doing so.<sup>25</sup> The United States Supreme Court denounced state efforts to impose its laws within tribal nations.<sup>26</sup>

Any initial respect given to tribes as sovereign governments by the federal government did not last long. European settlers sought more land and more natural resources and conflict for ownership of land.<sup>27</sup> The Indian Removal Act resulted in forced migrations by numerous tribes from the eastern United States.<sup>28</sup> By the late 1800s, Congress stopped making treaties with tribes and instead used its unilateral power by legislating matters of Indian affairs. In 1887, Congress passed the General Allotment Act, known as the Dawes Act, which broke up Indian reservation land and allotted acreage to individual Indians to own in fee simple.<sup>29</sup> In doing so, Congress hoped to assimilate Indians by making them individual landowners, enforcing European agrarian methods, and granting American citizenship.<sup>30</sup> The effect of the Dawes Act was to diminish tribal sovereignty, erase reservation or Indian territory boundaries, and force assimilation.<sup>31</sup> In allotting land to individual Indians, the

22. *See Id.* at 2.

23. *Id.* at 73 (“At the time of the European discovery of America, the tribes were sovereign by nature and necessity; they conducted their own affairs and depended upon no outside source of power to legitimize their acts of government.”).

24. *See* COHEN, *supra* note 1, at 19–29. However, the existence of treaties did not mean that the terms have been respected, nor does it mean the treaty-making process itself was free from corruption or abusive practices. *See id.* 24–25 n.6-11 and accompanying text.

25. *See* U.S. CONST. art. I, § 8, cl. 3 (granting power of Congress to regulate commerce with Indian Tribes); *id.* art. II, § 2, cl. 2 (granting the President power to make treaties with tribes subject to consent of the Senate). These affirmative grants of federal powers effectively removed from the states any power to do what had been granted to the federal government. *See* CANBY, *supra* note 1, at 14.

26. *Worcester v. Georgia*, 31 U.S. 515, 520 (1832) (“The whole intercourse between the United States and this [the Cherokee] nation is, by our constitution and laws, vested in the government of the United States.”) The United States Supreme Court’s early precedent in three cases authored by Chief Justice John Marshall in what are referred to as the “Marshall Trilogy,” became the “foundation of jurisdictional law excluding the states from power of Indian affairs, and it has much vitality today even though it is not applied to the full extent of its logic.” CANBY, *supra* note 1, at 19. The three cases are *Johnson v. McIntosh*, 21 U.S. 543 (1823); *Cherokee v. Georgia*, 30 U.S. 1 (1831); and *Worcester v. Georgia*, 31 U.S. 515 (1832).

27. For the historical events leading up to the Indian Removal Act, *see* COHEN *supra* note 1, at 41–50.

28. Indian Removal Act, Pub. L. No. 21–148, ch. 148, 4 Stat. 411 (1830).

29. General Allotment Act of 1887, Pub. L. No. 49–105, ch. 119, §1, 24 Stat. 388, 388, repealed by Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106–461 §§ 101–103, 114 Stat. 1991 (codified at 25 U.S.C. § 2201-2219 (2020)).

30. General Allotment Act at § 6.

31. *Cnty. of Yakima v. Confederated Tribes and Bands of the Yakima Nation*, 502 U.S. 251, 254 (1992). For a full explanation of the history of the General Allotment Act, *see* Cohen *supra* note 1, at 72–75 n.5–15 and accompanying text.

federal government effectively opened up reservations to ownership by non-Indian settlers.<sup>32</sup> As a result, non-Indian settlers acquired more than ninety million acres of land that had been guaranteed to tribes through treaties or other agreements.<sup>33</sup> These allotments of land held in fee that transferred to ownership by non-Indians today create a “checkerboard” of land ownership on reservations.<sup>34</sup>

This loss of land triggered increasingly serious poverty among Indians that the federal government could not ignore.<sup>35</sup> Congress reversed the policies advanced by the Dawes Act— allotment of Indian land and attempts to terminate tribal nations—with the Indian Reorganization Act (“IRA”).<sup>36</sup> The IRA was meant to restore tribal land to tribes and develop tribal economies.<sup>37</sup> Although the IRA was effective, the federal policies in favor of self-governance were short lived. By the end of World War II, the pendulum had swung again to federal policies against tribes and for termination of tribes. During this era, known as termination, Congress withdrew the federal government’s strong presence and allowed states to expand their civil and criminal jurisdiction within Indian Country.<sup>38</sup> The effects of termination were severely damaging to tribes both economically and culturally, weakening tribal sovereignty.<sup>39</sup> “Termination” meant the end of federal programs that offered services to tribes and their members, including health, educational and welfare services, and amounted to widespread loss of land by tribes.<sup>40</sup>

In the 1970s, the federal government renewed policies favoring self-determination and self-governance.<sup>41</sup> Congress passed a series of laws intended to expand tribal self-determination and self-governance and to revitalize and protect tribal cultural and spiritual practices.<sup>42</sup> The policy favoring self-determination continues to this day.

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32. CANBY, *supra* note 1, at 23–24.

33. *Id.*

34. Under Section 5 of the General Allotment Act, 24 Stat. 388 (codified as amended at 25 U.S.C. § 348), non-Indians purchased or homesteaded “surplus” Indian lands. This land that passed out of tribal or individual ownership no longer was considered to be Indian Country. *See Seymour v. Superintendent*, 368 U.S. 351 (1962).

35. LEWIS MERIAM, INSTITUTE FOR GOVERNMENT RESEARCH, *THE PROBLEM OF INDIAN ADMINISTRATION* 3 (1928).

36. Indian Reorganization (Wheeler-Howard) Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 5101–5121).

37. *Id.*

38. For extensive background on the history of the Termination Era, see COHEN, *supra* note 1, at §1.06 notes 1–33 and accompanying text. A major piece of legislation that was enacted during the Termination Era was the so called “Public Law 280.” 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. §§1162, 25 U.S.C. §§ 1231–26, 28 U.S.C. §1360). Public Law 280 expanded state civil and criminal jurisdiction in five states, and provided that other states could assume similar jurisdiction by statute or state constitutional amendment without consent of affected tribes. *See CANBY, supra* note 1, at 29.

39. COHEN, *supra* note 1, at §1.06.

40. *Id.*

41. *Id.* at §1.07 notes 1–98 and accompanying text.

42. The two major legislative acts were the passage of the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93–638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §450 et seq.) and the Tribal Self-Governance Act of 1994, Pub. L. No. 103–413, tit. III, 108 Stat. 4270 (1994) (codified as amended at 25 U.S.C. § 450a note, § 458aa et seq.).



Throughout the historical fluctuations in federal Indian policy, the federal government has had an obligation, referred to more broadly as the trust relationship, with Indian tribes. The trust relationship is generally based on the notion that when tribes relinquished their ancestral land to the federal government, the federal government had an obligation to respect tribal nations' unique political sovereign status *and also* provide for their welfare.<sup>43</sup>

An analogy to Indian law and policy is that “[h]istory has set [the] stage, but it is not the play.”<sup>44</sup> The history described above contextualizes both the conflicts of taxing authority between states and tribes, the fallout from the COVID-19 pandemic in Indian Country, and the current moment in which our legal system and society as a whole are reckoning with the legacy of colonialism.

### **B. Taxing Authorities in Indian Country**

There are multiple potential taxing authorities within Indian Country.<sup>45</sup> The federal government; state and local governments, and tribes themselves all have potential taxing authorities. The federal government's taxing authority is beyond the scope of this article.<sup>46</sup> This section explains tribal taxing authority and limitations; state and local taxing authority and expansions; the historic tension and recent litigation; why the potential double taxation is a problem; and the role of compacts in ameliorating the double tax problem.

The law in this area reflects the historical context explained above. During the first part of the United States' history, there was a bright line delineating the boundaries of state and tribal taxing authority, respectively.<sup>47</sup> When federal Indian policy shifted away from both promoting tribal self-governance and ensuring federal government engagement to the exclusion of states, state and local civil and criminal jurisdiction within Indian Country expanded.<sup>48</sup> With the expansion of state civil jurisdiction generally, states and local governments began to exercise taxing authority in Indian Country and the tribal authority to tax was gradually eroded. The historical context also highlights how the status of the land on which a transaction

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43. See CANBY, *supra* note 1, at 35–39.

44. HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, *THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER US POLICIES OF SELF-DETERMINATION*, xix (Oxford Univ. Press 2008).

45. Because the issue of what constitutes a tax and the purposes taxation serve is not a simple matter, some explanation may be useful at this juncture. Generally, taxation serves four governmental functions that sometimes overlap. Barsh, *supra* note 3, at 534. Taxes serve to create revenue streams, regulate business, redistribute wealth, and as a tool for fiscal stabilization. *Id.* For purposes of this article, the taxes at issue are generally for the purposes of funding government revenue needs.

46. As a general rule, the federal government has full taxing authority within Indian Country, whether exercised over non-Indians or tribes or Indians as individuals. See CANBY *supra* note 1, at 295. The federal government has permitted or allowed exemptions for some types of taxes against tribes and also exemptions from tax on some types of income derived by tribes and their members. *Id.* at 296–97.

47. Scott A. Taylor, *The Unending Onslaught on Tribal Sovereignty: State Income Taxation on Non-Member Indians*, 91 MARQ. L. REV. 917, 927 (“In these early years, states refrained from attempting to tax tribes, their lands, or people who were within tribal boundaries.”). Professor Taylor analyzed the powers of the federal government with exclusive authority to manage Indian affairs in the Constitution as compared to under the Articles of Confederation. *Id.* at 924–28.

48. See *supra* Part II.A, note 38 and accompanying text.

occurs and the political status of the individual or entity engaged in the transaction are critical factors in the analysis of whether a government has taxing authority within Indian Country.

A caveat is necessary here: this is only a summary of the law governing state and tribal taxing authority in Indian Country. The law in this area is complex and there are many thorough treatises on the topic.<sup>49</sup>

### 1. Tribal taxing authority

A tribe's power to tax depends on the persons or activity sought to be taxed and the location of the persons or activity. The power of a tribe to impose taxes over its own citizens or within its own territory is a fundamental attribute of tribal sovereignty.<sup>50</sup>

Generally, tribes also have the authority to tax transactions involving non-members that occur within their reservation.<sup>51</sup> A tribe's civil regulatory authority over non-members exists when the transaction occurs on reservation trust land, a consensual contractual agreement between the non-member and tribe exists, or when the activity being taxed has a direct effect on "the political integrity, the economic security, or the health or welfare of the tribe."<sup>52</sup> In *Merrion v. Jicarilla Apache Tribe*, the Supreme Court upheld a tribal severance tax imposed on non-Indian oil companies engaged in the production and extraction of natural gas on tribal land.<sup>53</sup> The Court in *Merrion* held the Tribe had the "inherent power" to tax the non-member entity, "whether this power derive[d] from the Tribe's power of self-government or from the Tribe's power to exclude" non-members.<sup>54</sup>

Tribal authority to impose tax within their territorial boundaries is not without limitations. One such limitation is legal in nature, and the other set of limitations are practical constraints.

#### a. Legal limitations on a tribe's power to tax – the "Atkinson Problem"

The Supreme Court has limited a tribe's authority in significant ways. For example, in *Atkinson Trading Post v. Arizona State Tax Commission*, the Supreme Court held that a tribe could not impose a tribal tax on occupants of a hotel owned

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49. In 1979, Professor Barsh described the state of the law in this arena as "aggravating," and a "willy-nilly . . . tangle." Barsh, *supra* note 3, at 533. See also Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 TAX LAW. 897 (2010) (cataloging the history from prior to the revolutionary war until present day in Professor Pomp's seminal work); COHEN, *supra* note 1, at §8.

50. *Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134, 152–53 (1980) (holding that a tribe can impose a tax on cigarettes on its own members). In *Colville*, the Court noted that Congress has the ability to divest a tribe of its authority to tax. *Id.*

51. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140–41 (1982).

52. This test is from the seminal case, *Montana v. United States*, 450 U.S. 544, 566 (1981), which articulated the extent of tribal authority over non-members generally. Note that the test from *Montana* regarding activities that affect "the political integrity, the economic security, or the health or welfare of the tribe" has been narrowly construed. *Id.* at 566.

53. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 159.

54. *Id.* at 149. The Court also addressed the lack of any express divestment of tax power by Congress. *Id.* at 149–52.

by a non-Indian that was located on fee land within the reservation.<sup>55</sup> The result in *Atkinson*—circumscribing a tribe’s authority because the tribe lacked ownership over the fee land within its reservation—is a direct consequence of the historical Allotment and Termination eras in which Indian land was allotted and allowed to be sold in fee to non-Indians.<sup>56</sup>

The Court’s focus on land status in *Atkinson* represents modern jurisprudence accommodating the realities of the history of allotment and principles of integration.<sup>57</sup> In a recent United States Supreme Court case, *McGirt v. Oklahoma*, the Court appears to shift away from a focus on land status, instead focusing on principles of territorial sovereignty, treaty language, and historical promises made to a tribe.<sup>58</sup> Whether *McGirt* represents a sea change in Supreme Court jurisprudence in Indian law remains to be seen.<sup>59</sup> It does not alter the law articulated in *Atkinson*. Tribal taxing authority is still limited based on land status within the reservation boundaries, negatively impacting tribes’ ability to raise revenue.

- b. Practical constraints on a tribe’s ability to raise revenue include lack of available revenue base.

As a practical matter, tribes may not be able to raise revenue by imposing a tax because the tribe lacks an available revenue base. Two state and local revenue sources are not available to tribes. States derive much of their tax revenue—almost 20 percent—from individual income taxes.<sup>60</sup> Although tribes have the authority to impose income taxes on their members, many individuals living within Indian Country do not have significant income to tax nor are tribal governments interested in assessing or collecting taxes from their own members.<sup>61</sup> States and localities are also heavily reliant on property tax revenue.<sup>62</sup> Tribes cannot tax much of their reservation land because it is held in trust by the federal government.<sup>63</sup> Even if the land is held in fee by individual tribal members, imposing a tax against its own

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55. *Atkinson Trading Post v. Shirley*, 532 U.S. 645, 647 (2001).

56. See *supra* Part II.A, notes 29–35 and accompanying text. The outcome in *Atkinson* was foreseen by the rules articulated in *Montana v. United States*. In *Montana*, the Court noted that a tribe lacks authority over parcels of non-Indian fee land even though they are within the reservation’s broader boundaries. 450 U.S. at 565–66. *But see* Florey, *supra* note 9, at 406 (proposing an expansion of the interpretation of the second *Montana* exception given the realities of COVID-19).

57. Blackhawk, *supra* note 11, at 1798 (explaining how “[i]ntegrationist, rights-based frameworks . . . are feared in Indian law, rather than celebrated”).

58. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2476 (2020).

59. For recent commentary on the impact of *McGirt* on future federal Indian law doctrine, see Dylan R. Hedden-Nicely & Stacy L. Leeds, *A Familiar Crossroads: McGirt v. Oklahoma and the Future of the Federal Indian Law Canon*, 51 N.M. L. REV. 300 (2021) (examining recent history of federal Indian law jurisprudence and contextualizing the likelihood of a shift in future decisions); Robert J. Miller, *McGirt v. Oklahoma: The Indian Law Bombshell*, THE FED. LAW., Mar.–Apr. 2021, at 31 (predicting possible ramifications to existing law of both civil and criminal jurisdiction within Indian Country).

60. *State and Local Revenues*, URBAN INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-and-local-revenues>.

61. CANBY, *supra* note 1, at 314.

62. Local governments derive up to thirty percent of their tax revenue from property taxes. See *Property Taxes*, URBAN INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/projects/state-and-local-backgrounders/property-taxes>.

63. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

members is not a viable option.<sup>64</sup> As explained below, a third practical constraint occurs when a tribe has the legal authority and potential tax base but has, at least potentially, overlapping jurisdiction with a state or local government.

## 2. *State and local governments' taxing authority in Indian Country*

States have the authority to tax persons, transactions, and property within their borders.<sup>65</sup> However, state taxing authority generally does not extend into a tribe's territorial boundaries.<sup>66</sup> Categorically, states and local governments lack the authority to legally impose taxes on tribes or tribal members inside Indian Country.<sup>67</sup> States cannot tax tribally-sourced income earned by a member of such tribe if the tribal member resides within the tribe's territory.<sup>68</sup> This categorical prohibition depends on who bears the legal incidence of the tax. Legal incidence refers to the entity or individual the tax is legally imposed upon, not to the entity or individual required to collect or remit the tax.<sup>69</sup> Legal incidence of a tax is a formalistic inquiry that does not address economic incidence, or the concept of who bears the economic cost or burden of a tax.<sup>70</sup> Given that legal incidence can be manipulated, states are free to draft around the doctrine.<sup>71</sup>

If the legal incidence of a state tax falls on non-Indians or non-member Indians, there is no categorical prohibition on the state tax.<sup>72</sup> In such cases, the validity of the state tax turns on whether, 1) the tax infringes on tribal self-government, and 2) the tax is otherwise preempted by federal law.<sup>73</sup>

Addressing the latter first, *Williams v. Lee*, which was not a tax case, articulated a broad rule that state action cannot infringe on the right of a tribe to make

64. See CANBY, *supra* note 1, at 314.

65. States have the powers not delegated to the federal government nor expressly prohibited. U.S. CONST. amend. X. See also COHEN, *supra* note 1, §8.03[1][a], 696 nn.2–4 and accompanying text.

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

67. See *id.* In *Chickasaw Nation*, the Court noted two ways in which a state would have taxing authority over tribes or tribal members within Indian Country: by Congressional permission in federal statute or by other "cession of jurisdiction." *Id.* at 458–59 (internal quotation omitted) (quoting *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 258 (1992)). States may tax property owned by non-Indians within Indian Country. See *Utah & N. Ry. v. Fisher*, 116 U.S. 28 (1885).

68. See *McClanahan v. Ariz. Tax Comm'n*, 411 U.S. 164, 165 (1973).

69. See CANBY, *supra* note 1, at 306. See also COHEN, *supra* note 1, §8.03[1][b], 698 nn.18–22 and accompanying text.

70. *Chickasaw Nation*, 515 U.S. at 460 ("If we were to make 'economic reality' our guide, we might be obliged to consider, for example, how completely retailers can pass along tax increases without sacrificing sales volume—a complicated matter dependent on the characteristics of the market for the relevant product.").

71. *Id.* ("[I]f a State is unable to enforce a tax because the legal incidence of the impost is on Indians or Indian tribes, the State generally is free to amend its law to shift the tax's legal incidence.").

72. See *Washington v. Confederated Tribes of the Colville Indian Rsrv.*, 447 U.S. 134 (1980).

73. The first case in which preemption was considered was *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965). In *Warren Trading Post*, the court prohibited state gross receipts tax on the earnings of a non-Indian operating a trading post on the Navajo Reservation. *Id.* at 691–92. The court interpreted the extensive federal licensing required for Indian traders as preempting states from creating any "additional burdens" through state taxes. *Id.* at 690.

its own laws and be subject to such laws.<sup>74</sup> The Supreme Court in *Williams* held that Arizona courts lacked jurisdiction to hear a dispute brought by a non-Indian against a member of the Navajo nation for a dispute that arose on the Navajo reservation.<sup>75</sup> While, as a jurisdictional doctrine, it sounds promising to support tribal sovereignty, Professor Pomp described the test in *Williams* as “an amorphous, subjective test and one (with the benefit of hindsight) that has not favored the tribes.”<sup>76</sup> To the contrary, the application of *Williams v. Lee*, has not been broadly interpreted as to state actions that constitute infringement.<sup>77</sup> Suffice it to say, though testing whether a state tax infringes on a tribe’s ability to make its own laws and be subject to such laws is part of the legal doctrine, no tax case between a tribe and state or local government has been decided in favor of a tribe to prohibit the state or local tax based on principles of infringement.<sup>78</sup>

The former inquiry—whether a state or local tax is preempted by federal law—is the *de facto* jurisprudential test applied in disputes between a tribe and state over the state’s assertion of taxing authority over non-Indians engaging in business in Indian Country.<sup>79</sup> The preemption analysis is also one of the reasons why state taxation authority is such a complex issue.<sup>80</sup> The so-called “preemption analysis” is really a balancing test weighing state and tribal interests. In a transaction within Indian Country involving only members of a tribe, the state has no interest and the federal government has a strong interest in promoting tribal self-governance.<sup>81</sup> In cases involving state tax imposed on non-Indians, the state’s interest, according to the Supreme Court, requires analysis of a “particularized inquiry into the nature of the state, federal, and tribal interest at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.”<sup>82</sup> The factors examined in this “particularized inquiry” include the extent of federal regulation and control of the activity the state seeks to tax, the regulatory and revenue-raising interest of states and tribes, and the existence and extent of state or tribal services.<sup>83</sup>

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74. 358 U.S. 217, 223 (1959) (“There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.”).

75. *Id.* at 217–18, 223.

76. POMP, *supra* note 49, at 1001 nn.402–403 and accompanying text.

77. *Id.* at 1001 n.404 and accompanying text.

78. See Fletcher, *supra* note 7, at 804–05 (arguing revival of the application of the test in *Williams v. Lee* would allow for tribes to demonstrate the impossibility of governing without the ability to generate revenue).

79. Professor Pomp’s commentary emphasizes that the *Bracker* preemption analysis (explained in detail below) “has come to overshadow the *Williams v. Lee* infringement test.” POMP, *supra* note 49, at 1131.

80. See generally, Pomp, *supra* note 49, at 903–04 (“[T]he issues raised by the taxation of Indians, the tribes, and those doing business with them are sui generis – and complicated, even by tax standards.”).

81. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980) (citing *Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv.*, 425 U.S. 463, 480–81 (1976); and then *McClanahan v. Ariz. Tax Comm’n*, 411 U.S. 164, 165 (1973)).

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

83. *Id.* at 148–51.

Courts have applied the preemption analysis to invalidate state taxes in Indian Country. In *White Mountain Apache*, the Court applied the preemption analysis and invalidated a state motor carrier license or use fuel tax on non-Indian logging businesses operating on tribal roads.<sup>84</sup> Additionally, courts have prohibited state gross receipts taxes imposed on non-Indian businesses providing services for tribes,<sup>85</sup> sales taxes imposed on selling goods to Indians and tribes within a reservation,<sup>86</sup> and motor fuel distributor taxes imposed on sales to tribal retailers.<sup>87</sup>

Applying the preemption test has also led courts to uphold the validity of state taxes. Courts have upheld state sales taxes on cigarette sales to non-members,<sup>88</sup> state severance taxes on extraction of oil and gas on Indian reservations,<sup>89</sup> and state taxes on non-Indians imposed on sales of coal,<sup>90</sup> among other types of business and transaction taxes imposed on non-Indians transacting in Indian country.

The recent case of *Tulalip Tribe v. Washington* is an example of a federal court allowing state taxation in Indian Country.<sup>91</sup> That case involved the Tulalip Tribe's development of commercial and retail space on land owned by the Tribe but held in trust by the federal government.<sup>92</sup> The Tribe leased retail and commercial space to many non-Indian businesses and the state of Washington and Snohomish county imposed various state and county taxes on those non-Indian businesses.<sup>93</sup> In its analysis, the district court held that federal law did not preempt the state and local taxes through a pervasive regulatory scheme.<sup>94</sup> Furthermore, in balancing the tribal versus state interests, the court found that the state and local governments provided sufficient services to the Tribe and those participating in the business at the commercial development made by the Tribe, that "more than justifi[ed] imposition of the taxes at issue."<sup>95</sup> The district court upheld the state and local taxes despite the finding of extensive infrastructure costs that were supported by minimal state monies.<sup>96</sup> *Tulalip Tribe* is a recent example of the litigation over the reach of state taxation in Indian Country and how state taxing authority diminishes tribal sovereignty. The preemption analysis has led to much litigation that continues to the present day.

### 3. *Judicial doctrines diminish tribal taxing authority which reduces opportunities for economic development within Indian Country and*

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84. *Id.* at 137–38.

85. *Ramah Navajo School Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832, 834 (1982).

86. *Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685, 685–86 (1965).

87. *Herzog Bros. Trucking, Inc. v. State Tax Comm'n*, 533 N.E.2d 255, 256 (N.Y. 1988).

88. *Washington v. Confederated Tribes of the Colville Indian Rsrv.*, 447 U.S. 134, 159 (1980).

89. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186 (1989).

90. *Peabody Coal Co. v. State*, 761 P.2d 1094, 1101 (Ariz. Ct. App. 1988).

91. 349 F. Supp. 3d 1046, 1062–63 (W.D. Wash. 2018).

92. *Id.* at 1049.

93. *Id.*

94. *Id.* at 1056–57.

95. *Id.* at 1062.

96. *Id.* at 1051. The Tribe contributed 76 percent of the financing necessary for building the infrastructure costs to create the commercial center. *Id.* The federal government contributed 19 percent, and the state contributed the remaining 5 percent of the cost. *Id.*

*erodes tribal sovereignty.*

The argument and analysis *infra* are based primarily on problems that occur in the subset of tax cases in which either, 1) the tribe lacks taxing authority within the reservation, or 2) the state or local government has potential authority to impose a tax on non-Indians transacting in Indian Country where the tribe has overlapping jurisdiction. These two issues create similar yet distinct problems for tribal sovereignty, complicating and reducing a tribe's ability to engage in economic development. Those differences are key to understanding the proposed solutions.

Although both types of cases diminish a tribe's tax base, the diminishment occurs for different reasons. In the first type of cases, where a tribe lacks jurisdiction to tax on non-Indian businesses located on fee land within a reservation (the "Atkinson problem"), the tribe's tax base is reduced as a matter of law. The second type of cases, where a state or local government asserts taxing authority over a transaction occurring within the tribe's territory that a tribe indisputably has taxing authority over (the "potential double tax problem"), the reduction in a tribe's tax base is not legally restricted, but it is diminished as a practical matter.

If a state successfully manipulates the legal incidence of a tax imposed in Indian Country onto non-Indians (and the tax is not preempted or deemed to infringe on the tribe under the *White Mountain Apache* analysis), the practical realities of the potential double tax forces tribes to make choices in which they cannot win economically. Regardless of who bears the legal incidence of a tax, the consumer always bears the economic incidence which drives up the cost of consumer goods and impacts consumer choices.<sup>97</sup> Increased cost of doing business in Indian Country disincentivizes outside investment in Indian Country, which in turn reduces economic activity in Indian Country altogether.<sup>98</sup>

The question of whether a state or local government has taxing authority in Indian Country is a question historically answered by the courts.<sup>99</sup> As explained above regarding the cases interpreting the preemption standard in *White Mountain Apache*, the standard has been applied to surprising and somewhat conflicting outcomes.<sup>100</sup> Surprising is never a positive way to describe tax consequences—any surprise violates the fundamental tax policy principle that tax systems "ought to be clear and plain."<sup>101</sup> Any uncertainty costs are also borne by tribes, with states having nothing to lose to assert a tax knowing that litigation is time-consuming and

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97. For an excellent discussion of this problem, see Crepelle, *supra* note 7, at 1016–18 & nn.137–47.

98. This "double bind" problem is well documented in both legal scholarship and the economic literatures on hurdles to improving economic conditions in Indian Country. Kelly S. Croman & Jonathan B. Taylor, *Why Beggar thy Indian Neighbor? The Case for Tribal Primacy in Taxation in Indian Country*, THE UNIVERSITY OF ARIZONA NATIVE NATIONS INSTITUTE 17–19 (May 4, 2016), [http://nni.arizona.edu/application/files/8914/6254/9090/2016\\_Croman\\_why\\_beggar\\_thy\\_Indian\\_neighb\\_or.pdf](http://nni.arizona.edu/application/files/8914/6254/9090/2016_Croman_why_beggar_thy_Indian_neighb_or.pdf). ("Double taxation puts tribal governments in a double bind: Levy a tax to recover investments in development and cause businesses to flee, or do not levy a tax and fail to recover the costs of investing in development.") See also Cowan, *supra* note 8, at 94 (noting that double taxation, or the possibility thereof, disincentivizes non-Indian investment in reservation businesses).

99. See Cowan *supra* note 8. See also Pomp, *supra* note 49.

100. See *supra* Part II.B.2 and text accompanying notes 84–96.

101. Mark J. Cowan, *Taxing Cannabis on the Reservation*, 57 AM. BUS. L.J. 867, 898 (2020) (quoting ADAM SMITH, THE WEALTH OF NATIONS (1776)).

expensive. Such uncertainty of potential double taxation deters much outside investment in Indian Country.<sup>102</sup>

Ultimately, in such double tax cases, if a state even asserts taxing authority in Indian Country, the tribe has to choose between imposing its tax, creating a duplicative tax which will deter business activity, or not imposing its tax and foregoing revenue.<sup>103</sup> Some tax experts have recommended non-Indian investors or businesses to seek exception to tribal tax regimens to ensure duplicative taxes will not be imposed on businesses within Indian Country.<sup>104</sup> For the tribe, it is a lose-lose proposition—lose the business activity that generates revenue or lose the tax revenue. Scholars have pointed out how such double taxation is not tolerated in multi-state or international tax arenas because of the potential for economic harm.<sup>105</sup>

The *Atkinson* problem also creates a problem that can result in behavioral distortions. If a hotel on fee land owned by non-Indians does not impose a tribal hotel tax on guests whereas a hotel across the street located on tribally-owned land (or trust land) does impose a tax on guests, potential guests will prefer the hotel where no tax is imposed, making their decisions based on tax implications.<sup>106</sup> From an economic perspective, consumers should make their decisions independent of tax implications.<sup>107</sup> Varied tax consequences in a close geographical area “distort the free market geographic allocation of capital, labor, and technology.”<sup>108</sup>

In both of these types of cases—the *Atkinson* problem and the double tax problem—a tribe’s taxing authority is diminished while a state’s taxing authority encroaches on the tribe. The *Atkinson* problem is geo-political; the tribe’s own authority to govern within its territory is legally reduced. In the double tax problem, while the tribe’s ability to impose its own laws is not reduced, the impact is

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102. For a complete discussion of the economic consequences of double taxation or the prospect of double taxation, see Croman & Taylor, *supra* note 98, at 1–24.

103. See, e.g., *Tulalip Tribes v. Washington*, 349 F. Supp. 3d 1046, at 1059 (W.D. Wash. 2018) (acknowledging this practical limitation by stating that “the only tribal interest the State and County taxes actually ‘interfere or are incompatible with’ is the Tribes’ ability to collect the full measure of its own sales tax from the non-Indian businesses.”).

104. Erik M. Jensen, *Taxation and Doing Business in Indian Country*, 60 ME. L. REV. 1, 8 (2008) (describing the state tax applicability as certain and suggesting a potential investor in Indian Country could negotiate with tribal governments to “lessen any otherwise applicable tribal taxation.”).

105. See Creppelle, *supra* note 7, at 1017. See also Cowan, *supra* note 98, at 126–27 (explaining nuances in comparison of double tax regimes between foreign governments versus tribes and states).

106. The caselaw itself acknowledges that a government imposing no or lower tax rates compared to neighboring jurisdictions have a competitive advantage. See *Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv.*, 425 U.S. 463, 482. Under the common law, tribal governments are prohibited from using tax arbitrage to attract customers. See *Washington v. Confederated Tribes of the Colville Indian Rsrv.*, 447 U.S. 134, 155 (1980) (“[F]ederal Indian law . . . [does not] authorize Indian tribes . . . to market an exemption from state taxation. . . .”). A double standard exists with respect to tribes because these distortions are permitted or tolerated when states make choices to market their tax exemption, beyond the *Atkinson* problem. See Creppelle, *supra* note 7, at 1014, n.126 (giving examples of states using tax arbitrage to attract business).

107. Cf. Barsh, *supra* note 3, at 542–44 (discussing the consequences of “tax geography” that arise when “coequal political subdivisions” compete for the same tax base).

108. *Id.* at 544.



functionally equivalent to legal reduction. Both problems present encroachment which reduces tribal sovereignty.<sup>109</sup>

4. *Intergovernmental tax compacts as a solution to the double tax problem.*

An extrajudicial solution to the double tax problem is for states and tribes to enter into tax revenue compacts.<sup>110</sup> Such compacts are negotiated agreements between the tribal government and the state to resolve both jurisdictional and substantive legal matters.<sup>111</sup> Over 200 tribes have entered into tax revenue compacts with more than eighteen states.<sup>112</sup>

Tax revenue compacts between states and tribes generally establish “political policies,” such as the inherent sovereignty of tribes and tribal exemption from state taxation, generally; address sovereign immunity issues; and spell out terms relating to revenue.<sup>113</sup> Some compacts require tribes to impose and collect taxes at least equal to a similar tax imposed by the state.<sup>114</sup> The revenue sharing arrangements on that tax imposed vary—from allowing a tribe to retain 100 percent of the revenue generated by the tribe to requiring the tribe to remit taxes to the state and then receive a remitted allocation of the tax revenue according to enrolled tribal populations.<sup>115</sup>

Compacts have been heralded as the best mechanism for tribes to provide certainty and avoid litigation on matters of state taxation within their territory.<sup>116</sup> Benefits to compacting include creating certainty for tribes to “plan for the future” and create revenue streams that will support business development, financing for

109. The literature is replete with criticisms of the doctrine in this area. See Fletcher, *supra* note 7, at 802–05 (offering solutions to reform the law in the area of state tax in Indian Country, including the option of courts to “[r]eview the ‘tribal infringement’ test of *Williams v. Lee*.”).

Again, this article seeks not to “fix” the jurisprudence, but offers an extrajudicial policy solution akin to the framework offered by Professor Blackhawk. Blackhawk, *supra* note 11, at 1797 (“It has often been said that federal Indian law is ‘incoherent’ and in need of reform, because the doctrine does not comport with general public law principles. But perhaps it is the general principles of public law . . . that are in need of reform.”). To that end, Professor Blackhawk notes how “Indian law unsettles . . . presuppositions about how best to distribute and limit power in order to protect minorities,” documenting how “national oversight, rights-based frameworks, and judicial solicitude” have failed Indian Country. *Id.* Certainly in the context of the (over)reaches of state taxation in Indian Country, the federal judiciary has been the proverbial nail in the coffin for tribal governments to develop tribal tax revenue streams.

110. Matthew L.M. Fletcher, *The Power to Tax, The Power to Destroy, And the Michigan Tribal-State Tax Agreements*, 82 U. DET. MERCY L. REV. 1, 4 (2004) (“Voluntary agreement is by far the best method for Indian tribes to settle a dispute with state governments.”).

111. Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 HARV. L. REV. 922, 924 (1999).

112. *Tax Fairness and Tax Base Protection: Hearings on H.R. 1168 Before the H. Comm. on Res.*, 105th Cong. (1998) (statement of W. Ron Allen, president of the Nat’l. Cong. of Am. Indians).

113. Cowan, *supra* note 8, at 133–34.

114. *Id.* at 134.

115. *Id.* at 134 & n.216 (“Under some compacts, tribes have agreed to charge a tax that is at least equal to the state tax . . . and in exchange the states have allowed the tribes to retain 100% of the tax.”).

116. See Cowan, *supra* note 8, at 134. See also Richard J. Ansson Jr., *State Taxation of Non-Indians Whom Do Business with Indian Tribes: Why Several Recent Ninth Circuit Holdings Reemphasize the Need for Indian Tribes to Enter Into Taxation Compacts with Their Respective State*, 78 OR. L. REV. 501 (1999) (advocating for tribes to compact with states).

projects, and ensure ability for the tribe to provide services to tribal members.<sup>117</sup> Depending on the terms of the agreements, compacts may offer increases in revenue.<sup>118</sup> There is also the hope that as states and tribes cooperate in tax revenue sharing agreements, states and tribes will enter into cooperative agreements in other areas of the law, such as zoning, law enforcement, and environmental regulation.<sup>119</sup>

Compacts also have downsides. The outcome and terms of a compact vary tremendously based on the willingness of the state to agree to favorable terms and the tribe's own political bargaining power.<sup>120</sup> Compacting requires that tribes concede or waive sovereign immunity, at least in part, which allows state encroachment of civil and criminal jurisdiction.<sup>121</sup> Compacting also often permits state taxation within Indian Country or it allows the state to dictate terms of tribal taxation, eroding tribal sovereignty.<sup>122</sup>

Compacting represents a cooperative solution that has similar attributes to the proposals set forth in the analysis *infra*.<sup>123</sup> However, compacts have not sufficiently solved the problem and cannot do so.<sup>124</sup> Economic development requires both creating business investment and drawing tax revenues from those activities or investments. Compacting will always require concessions of sovereignty that undermine a tribe's ability to generate revenue.<sup>125</sup>

### **C. COVID-19 has disproportionately impacted Native American Indians and tribal governments compared to non-Indian communities.**

The COVID-19 pandemic has had a disproportionate effect on American Indian individuals and tribal communities.<sup>126</sup> This reality reflects, in part, the fact that tribal governments “navigate a tricky legal and political environment.”<sup>127</sup> This part provides background on the disparate impact of the COVID-19 pandemic on

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117. Fletcher, *supra* note 110, at 44.

118. *Id.*

119. *Id.* This idea for “cooperative sovereignty” was championed as by Justice Gorsuch in the majority opinion in *McGirt v. Oklahoma*, 591 U.S. 1, 41 (2020). The court cited the fact that Oklahoma “has negotiated hundreds of intergovernmental agreements with tribes.” *Id.* Although in the context of Professor Fletcher’s article on tribal-state revenue compacts, the agreements were a collaborative negotiation of a number of tribes and the state of Michigan. Fletcher, *supra* note 110, at 5–6. As states and tribes engage in compacting around tax revenue, there is the hope that more states and tribes are enticed to do so.

120. Cowan, *supra* note 8, at 134.

121. Fletcher, *supra* note 110, at 44.

122. *See* Fletcher, *supra* note 110, at 44.

123. *See* discussion *infra* Part III.A.1.d.

124. *Id.*

125. Fletcher, *supra* note 7, at 805 (“The ability of an Indian tribe to raise revenues that will adequately fund tribal government services such as housing, health care, social services, education, law enforcement and public safety, youth and elder services, and even job creation is a right of self-government.”).

126. *See generally* DOSHI ET AL., *supra* note 10.

127. Matthew L.M. Fletcher, *Indian Lives Matter: Pandemics and Inherent Tribal Powers*, 73 STAN. L. REV. ONLINE 38 (2020), <https://www.stanfordlawreview.org/online/indian-lives-matter/>. *See also* Katherine Florey, *Toward Tribal Regulatory Sovereignty in the Wake of the COVID-19 Pandemic*, 63 ARIZ L. REV. 399 (2021) (calling for expanding tribal regulatory authority over non-members under *Montana* exception for “health and welfare” of the tribe).

tribes and their people in terms of both health and economic outcomes. It documents some of the disputes that have arisen between states as tribes have exercised their sovereignty during the pandemic.

### 1. *Disparate impact in health outcomes*

The disparate impact of COVID-19 within Indian Country is perhaps most visible in the comparative statistics of infection and mortality rates of the virus among Native American Indians compared with non-Native individuals.<sup>128</sup> Early in the pandemic, virus infection rates on tribal lands were more than four times higher than in the rest of the United States.<sup>129</sup> According to data from the United States Centers for Disease Control and Prevention, “the COVID-19 incidence and mortality (55.8 per 100,000) rates in Native Americans and Alaska Natives are 3.5 and 1.8 times those measured in Whites, respectively.”<sup>130</sup>

It is impossible to generalize the direct causes of the disparity. Public health scholars identify factors that contribute to the health issues faced by Native Americans, which include “(1) limited access to appropriate health facilities; poor access to health insurance . . . 3) insufficient federal funding [for federal Indian Health Service] 4) inadequate quality of care; and 5) insufficient education and poverty.”<sup>131</sup> The last reason—widespread poverty—is inextricably connected to

128. DOSHI ET AL., *supra* note 10, at 1 (highlighting data as of June 18, 2020, showing Navajo Nation had highest infection rate in the United States and Native people make up only 0.1 percent of population of New Mexico but more than 55 percent of the coronavirus cases in the state. *Id.* (The rate of infection of COVID-19 among Native American Indian and Alaska Natives is three times that of whites, resulting in hospitalization rates more than 5.3 times higher than that of whites and dying at 1.4 times the rate of whites). See also Kalen Goodluck, Lucy Meyer, & Anjali Shrivastava, *A Crude Virus: How ‘Man Camps’ Can Cause a COVID Surge*, HIGH COUNTRY NEWS (Jan. 8, 2021), <https://www.hcn.org/articles/indigenous-affairs-covid19-a-crude-virus-how-man-camps-can-cause-a-covid-surge>.

129. Stephanie Russo Carroll et al., *Indigenous Data in the COVID-19 Pandemic: Straddling Erasure, Terrorism, and Sovereignty*, SOC. SCI. RSCH. COUNCIL (June 11, 2020), <https://items.ssrc.org/covid-19-and-the-social-sciences/disaster-studies/indigenous-data-in-the-covid-19-pandemic-straddling-erasure-terrorism-and-sovereignty/> (full data on infections and mortality among Native American Indian individuals remain elusive due to fluidity of tribal residency, but it is certainly lower than reported data).

130. Gabriella Y. Meltzer et al., *Environmentally Marginalized Populations: the “perfect storm” for infectious disease pandemics, including COVID-19*, J. OF HEALTH DISPARITIES RSCH. and PRAC., <https://digitalscholarship.unlv.edu/jhdrp/vol13/iss4/6>. This data is corroborated in a number of studies also by the CDC or other governmental entity. See also Jessica Arrazola, et al., *Covid-19 Mortality Among Americans Indian and Alaskan Native Persons – 14 States, January–June 2020*, CTR. FOR DISEASE CONTROL and PREVENTION 1, (Dec. 11, 2020) <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6949a3-H.pdf> (“A recent analysis found that the cumulative incidence of laboratory-confirmed COVID-19 cases among AI/AN persons was 3.5 times that among White persons. Among 14 participating states, the age-adjusted AI/AN COVID-19 mortality rate (55.8 deaths per 100,000; 95% confidence interval [CI] = 52.5–59.3) was 1.8 (95% CI = 1.7–2.0) times that among White persons (30.3 deaths per 100,000; 95% CI = 29.9–30.7.” A closer look at the data reveals that the disparities between AI/AN and white populations are greater among younger people. “Although COVID-19 mortality rates increased with age among both AI/AN and White persons, the disparity was largest among those aged 20–49 years. Among persons aged 20–29 years, 30–39 years, and 40–49 years, the COVID-19 mortality rates among AI/AN were 10.5, 11.6, and 8.2 times, respectively, those among White persons.”).

131. Ayeisha Cox, *The State of Tribal Health: The Affordable Care Act’s Effect on Tribal Health Care Systems*, WIDNER J. L. ECON. & RACE, Dec. 1, 2014, at 1, 13.

economic conditions on reservations, which, as explained above, is a result of the history of colonialism and inconsistent federal support.<sup>132</sup>

Problems related to depressed economic conditions, such as lack of infrastructure and rural, geographically isolated reservations, also contribute to the disparate impact.<sup>133</sup> For example, data showed that one third of Navajo Nation residents “live without electricity, paved roads, cellphone service, landlines, safe housing, or other essentials of modern life.”<sup>134</sup>

The harms of the increased mortality in Indian Country as a result of the pandemic extend into the fabric of the existence of tribal nations. The deaths of many Native American Indian elders amount to a “cultural crisis,” not only because of the elders’ depth of knowledge of tribal language and customs, but also because of the important leadership role elders play in many tribal nations.<sup>135</sup>

As the pandemic has progressed, one very bright spot for tribes has been the efficiency with which tribes have mobilized members for vaccination.<sup>136</sup> Tribes outpaced state counterparts in terms of getting vaccines into the arms of their citizens.<sup>137</sup> Vaccination has been accomplished with tribal direction and is evidence that tribal sovereignty and self-governance works.<sup>138</sup>

## 2. *Disparate impact on economic conditions*

The economic conditions within Indian Country stemming from COVID-19 are intertwined with the disparate impact COVID-19 has on the physical health of Native American populations. Although some of the economic downturn in Indian Country could be attributed to economic conditions in broader society, such as decrease in oil and gas extraction as a result of reduction in travel, the economic

132. *See id.* For the history of fluctuating federal policies that created current conditions in Indian Country, *see also* Fletcher, *supra* note 8, at 102.

133. Meltzer et al., *supra* note 130 (link between poor public health outcomes and the environmental conditions is also noteworthy and the literature notes environmental toxin exposures). *See also* Warigia M. Bowman, *Dikos Nitsaa’igii-19 (The Big Cough): Coal, Covid, and the Navajo Nation* (forthcoming, not yet published) (connecting COVID-19’s spread on the Navajo Nation in part based on “high levels of pollution from uranium mining, oil and gas well, and coal mining.”).

134. *Id.*

135. Jack Healy, *Tribal Elders Are Dying from the Pandemic, Causing a Cultural Crisis for American Indians*, N.Y. TIMES (Jan. 12, 2021), <https://www.nytimes.com/2021/01/12/us/tribal-elders-native-americans-coronavirus.html>.

136. Kirk Siegler, *Why Native Americans Are Getting COVID-19 Vaccines Faster*, NPR, (Feb. 19, 2021), <https://www.npr.org/2021/02/19/969046248/why-native-americans-are-getting-the-covid-19-vaccines-faster>.

137. *See* Rima Krisst, *Navajo outpacing states in rate of vaccinations*, NAVAJO TIMES, (Mar. 9, 2021), <https://navajotimes.com/reznews/navajo-outpacing-states-in-rate-of-vaccinations/>; *see also* Brian Bull, *Tribes Report Successes in COVID-19 Vaccine Rollout*, THE OREGONIAN, (Mar. 12, 2021), <https://www.oregonlive.com/coronavirus/2021/03/tribes-report-successes-in-covid-19-vaccine-rollout.html>; Jack Healy, *Plenty of Vaccines, but Not Enough Arms: A Warning Sign in Cherokee Nation*, N.Y. TIMES, (Mar. 16, 2021), <https://www.nytimes.com/2021/03/16/us/vaccines-covid-choke-tribe-native-americans.html>, (“It is a side effect of early successes.”).

138. *See* Krisst, *supra* note 137.

“shut downs,” were largely attempts to mitigate the spread of the virus.<sup>139</sup> Aware that stringent closures result in economic losses, tribes have chosen to protect human life over revenues. The Blackfeet Nation, located in Montana and adjacent to the eastern side of Glacier National Park, remained closed and in lockdown even after the state began to allow reopening after initial lockdowns in March 2020.<sup>140</sup> Blackfeet’s economy depends on tourism, mostly connected with neighboring Glacier National Park.<sup>141</sup> But, rather than allow the thousands of tourists flocking to Glacier’s east entrances to cross the Blackfeet’s reservation, the Tribe closed the reservation through the entire summer tourist season.<sup>142</sup>

Tribes that depend on tourism, hospitality, and gaming have closed their businesses to stave off COVID-19 infections. Data shows that, as of June 2020, the casino closures starting in March 2020 resulted in an “estimated loss of more than \$4.4 billion in economic activity [and] \$997 million in lost wages.”<sup>143</sup> A survey of over 400 businesses in Indian Country found that about eighty percent of tribally-owned small businesses reported losses as of July 2020.<sup>144</sup> Businesses engaged in “arts, entertainment, and recreation,” were hit especially hard.<sup>145</sup> Another survey found that, while 68 percent of Indian Country’s business experienced a decline of at least 20 percent, 16 percent of surveyed businesses experienced a 100 percent loss in revenue.<sup>146</sup> One of the studies notes that layoffs and furloughs in Indian Country were less common than in non-Indian businesses overall.<sup>147</sup>

In 2021, the federal government responded to the economic crisis of the pandemic with the American Rescue Plan.<sup>148</sup> The American Rescue Plan has buoyed tribal governments with funding to mitigate the “fiscal effects” of COVID-19 on

139. Frank Schneider & Allie Schwartz, *The New World of COVID-19: Paradigm Shifts in the Oil and Gas Industry*, NAT’L L. REV. (Sept. 30, 2020), <https://www.natlawreview.com/article/new-world-covid-19-paradigm-shifts-oil-and-gas-industry>. (“The historic collapse in demand due to COVID-19 restrictions on travel and the general decline in economic activity” shocked the oil and gas industry.)

140. Kathleen McLaughlin, *A Closed Border, Pandemic-Weary Tourists and a Big Bottleneck at Glacier National Park*, WASH. POST (July 11, 2020), [https://www.washingtonpost.com/national/a-closed-border-pandemic-weary-tourists-and-a-big-bottleneck-at-glacier-national-park/2020/07/10/607694f2-c2c0-11ea-b4f6-cb39cd8940fb\\_story.html](https://www.washingtonpost.com/national/a-closed-border-pandemic-weary-tourists-and-a-big-bottleneck-at-glacier-national-park/2020/07/10/607694f2-c2c0-11ea-b4f6-cb39cd8940fb_story.html).

141. Victor Yvellez, *Virus Fight: Blackfeet Covid Restrictions Take Toll*, MISSOULIAN (Oct. 27, 2020), [https://missoulian.com/news/local/virus-fight-blackfeet-covid-restrictions-take-toll/article\\_53f48d1a-6d3b-5066-a358-c0e6d68c35c6.html](https://missoulian.com/news/local/virus-fight-blackfeet-covid-restrictions-take-toll/article_53f48d1a-6d3b-5066-a358-c0e6d68c35c6.html).

142. *Id.*

143. DOSHI ET AL., *supra* note 10, at 1.

144. Donna Feir et al., *Indian Country small businesses face strong headwinds in Covid-19 recovery*, FED. RESERVE BANK OF MINNEAPOLIS (Sept. 8, 2020), <https://www.minneapolisfed.org/article/2020/indian-country-small-businesses-face-strong-headwinds-in-covid-19-recovery>.

145. *Id.* (“COVID-19 has affected some Indian Country businesses more than others. Fully four months after the pandemic and associated public health measures forced many businesses to suspend operations, 1 in 6 businesses reports having lost all of its revenue (as of mid-July) because of COVID-19.”)

146. *Survey Results Detail COVID-19’s Impact on Indian Country’s Economy*, THE NAT’L CTR. FOR AM. INDIAN ENTER. DEV., <https://www.ncaied.org/survey-results-detail-covid-19s-impact-on-indian-countrys-economy/>.

147. Feir et al., *supra* note 144.

148. American Rescue Plan Act of 2021, Pub. L. No. 117-2 (Mar. 11, 2021).

tribal government revenues.<sup>149</sup> It has also provided emergency funding for state and local governments.<sup>150</sup>

3. *Poor public health and economic outcomes are correlated to state encroachment on tribal sovereignty.*

As the literature demonstrates, the public health situation in Indian Country is worsened by constraints on tribal sovereignty, states' expanding authority, and tension between tribes and states.<sup>151</sup> The federal government's failure to meet its trust obligation over centuries ultimately created conditions that allowed COVID-19 to disparately impact tribes and Native American Indian peoples.<sup>152</sup> Rather than truly honor those obligations, the federal government, however, has "consistently fallen short . . . by severely underfunding almost every dimension of the trust relationship through budget cuts, neglect, and usurpation of sovereign authority."<sup>153</sup>

One way that the federal government has failed to fully meet its trust obligations is by tolerating, if not outright condoning, state encroachment on Indian tribes' sovereignty and jurisdictional authority.<sup>154</sup> In such a vacuum of power, tribal governments are at the political whim of the states in which the tribal nation is geographically located.

The following examples of state-tribal relations are illustrative. Blackfeet's decision to close its reservation to outsiders was respected and supported by then-Montana Governor Steve Bullock.<sup>155</sup> Other tribes, in exercise of their sovereignty, made similar decisions to close their reservations and impose quarantines and curfews—but were met with opposition and hostility from state and local leaders. The Oglala Sioux and Cheyenne River Sioux Tribes of South Dakota, for example, also restricted access through their reservations,<sup>156</sup> but South Dakota Governor Kristi Noem sought to prohibit them from enforcing their closures against non-members, even going so far as requesting federal intervention.<sup>157</sup> Another example of local attempts to interfere with tribal sovereignty during the pandemic were letters from New Mexico sheriffs to the Navajo police "insisting that the tribe refrain from citing

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149. *Id.* sec. 9901, § 602(a)(1) (allocating \$20 billion for States, territories, and tribes).

150. *Id.*

151. Florey, *supra* note 9, at 415–16, 434 (arguing that *Montana* framework for tribal authority hinders effective self-governance and calls for expansion of the "health and welfare" exception under *Montana* for stronger tribal power to safeguard public health); Bowman, *supra* note 133, at 7–9 (arguing for energy policy changes on the Navajo Nation to mitigate and prevent public health crises such as COVID-19); Fletcher, *supra* note 11, at 44–47 (arguing for increased tribal sovereignty to address the COVID-19 pandemic).

152. DOSHI ET AL., *supra* note 10, at 1–2 ("At the root of all these vulnerabilities are the broken promises that the federal government made to tribes in the constitutional process of signing treaties to acquire their lands. Tribes ceded huge swaths of land to the United States with the formal, treaty enshrined understanding that the federal government would protect the tribes as sovereign political entities whose right to self governance it would safeguard and to whom it would provide adequate resources to deliver essential services.").

153. *Id.* at 2.

154. Fletcher, *supra* note 9, at 38–41.

155. McLaughlin, *supra* note 140.

156. *Id.*

157. *Id.*

nonmembers” during a tribe-instituted curfew to mitigate the spread of COVID-19.<sup>158</sup> State attempts to limit tribal sovereignty during the pandemic include the examples of Noem threatening to sue the Cheyenne River Sioux and Oglala Sioux over their quarantine roadblocks, as well as the request from county sheriffs in New Mexico for Navajo police to refrain from citing non-members who violated a tribal curfew on the Navajo reservation in place to curb infections.<sup>159</sup>

The economy and tax base are two sides of the same coin for a tribe’s financial self-sufficiency.<sup>160</sup> The lack of these revenue streams and the losses caused by health and safety measures taken during the pandemic have “impaired tribes’ ability to provide essential governmental services such as health care, education and public safety at a time when the need is highest.”<sup>161</sup> This continues a trend that started generations ago, putting the tribes in a no-win situation that forces them to rely largely on support from the federal government, which has essentially looked the other way.

#### **D. Social justice for tribes means addressing historic and continued injustices of colonialism.**

COVID-19 brought to the surface problems in Indian Country that are centuries in the making. To ignore the fact that at the same time that the pandemic has taken hold of the world, the explosion of racial justice movements has prompted a global reckoning of racial and economic justice would be to ignore the broader social-political context of the pandemic and the social imperatives to rectify the injustices.<sup>162</sup> The Black Lives Matter movement and other racial justice movements have ignited collective consciousness about systematic oppression, but for Native American Indians and tribal governments, the reckoning is not just about race. For indigenous communities, these movements “also stem from the political status of the inherent sovereignty of tribal nations and Indigenous peoples.”<sup>163</sup>

158. These examples were compiled and documented by Professor Fletcher in his recent essay. See Fletcher, *supra* note 11, at 38 at n.2 and accompanying text (citing Letter from Tony Mace, Sheriff, Cibola Cty., to Officer in Charge, Ramah Navajo Police Dep’t (Apr. 10, 2020); Letter from James Maiorano III, Undersheriff, McKinley Cty., and Douglas Decker, County Att’y, Cty. Of McKinley, to Ramah Navajo Police Dep’t (Apr. 9, 2020)).

159. *See id.*

160. *See In Pursuit of Tribal Economic Development, supra* note 7, at 784–800 (explaining “barriers and dangers” of a government utilizing economic development of business creation for revenue generation without also creating tax streams).

161. DOSHI ET AL., *supra* note 10, at 1.

162. I do not purport to correlate the pandemic and the racial justice protests, though there is some research to support the notion that “the pandemic’s negative financial consequences have . . . been helping fuel the protests,” Maneesh Arora, *How the Coronavirus Pandemic Helped the Floyd Protests Become the Biggest in U.S. History*, WASH. POST (Aug. 5, 2020), <https://www.washingtonpost.com/politics/2020/08/05/how-coronavirus-pandemic-helped-floyd-protests-become-biggest-us-history/>.

163. Susan Smith Richardson, *Native Americans and the Racial Reckoning* (Interview with Randall Akee), THE CENTER FOR PUBLIC INTEGRITY (Oct. 21, 2020), <https://publicintegrity.org/inside-publici/newsletters/the-moment/native-americans-and-the-racial-reckoning/>.

Professor Blackhawk addresses the distinction between social justice issues pertaining to Indian tribes from those focused on race.<sup>164</sup> She calls for looking at “[c]olonialism and the failure of federal Indian law and policy” to “inform our general principles of public law as extensively as the failures of slavery and Jim Crow segregation.”<sup>165</sup> To that end, Professor Blackhawk argues that “[t]he recognition of inherent tribal sovereignty and the use of power to mitigate colonialism and subordination should take its place aside *Brown v. Board of Education* and the celebration of rights as a vital way to mitigate constitutional failure and to protect minorities from subordination.”<sup>166</sup> At the heart of the discussion of tribal sovereignty is tribal governments’ focus on their “distinctly unique relationship to particular places, particular land.”<sup>167</sup> A tribe’s connection to its land affects economic justice because “the resources available for Indigenous peoples were primarily with land and access to land but also water rights, mineral rights, access to resources like rivers and ocean fronts that [produced food], forests and other aspects of the environment.”<sup>168</sup> Beyond the nation’s broader reckoning with racial and social justice, adequately addressing racial, social, and economic justice within Indian Country means “returning land, returning resources to Indigenous peoples,” and doing so “in an equitable way and an economically successful way.”<sup>169</sup>

While there may be overlap in the social justice calls to reckon with the evils of the legacies of slavery and the legacies of colonialism, the calls for justice in Indian Country are all about sovereignty.<sup>170</sup> “[I]t all comes down to jurisdiction, self-governance and having the land base to be sustaining.”<sup>171</sup>

Tribal economies bear the burden of the history of state encroachment on tribal land and the complicated legal landscape of state taxation within Indian Country that chills outside business investment. Those problems are magnified by the fall-out of the COVID-19 pandemic and are generally symptoms of the perpetuation of colonialist policies. Moving forward, states have opportunities to reshape tax policies with respect to Indian Country to promote tribal sovereignty and build strong economies.

### III. MOVING FROM ZERO-SUM TO ECONOMIC PARTNERS.

One prominent scholar stated: “Covid-19 is a once-in-a century pandemic. But wildfires and natural disasters are not, income inequality is not, housing insecurity is not. How do we make investments now that these vulnerable

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164. Blackhawk, *supra* note 11, at 1861–62. For social justice movements based or focused on race, the framework has always been how to obtain civil rights; for Native Americans and tribes, the focus is “a ‘power movement’ aimed at reclaiming homelands and the political and economic power sufficient to govern them.” *Id.* at 1861.

165. *Id.* at 1861–62.

166. *Id.* at 1862.

167. Richardson, *supra* note 163.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*



communities not only survive COVID-19, but also thrive in recovery?”<sup>172</sup> The answer to the question—how to ensure Indian Country thrives in the recovery—is to promote tribal self-governance and tribal sovereignty. There are many dimensions to tribal sovereignty, an important one being freedom from state infringement.

This article should not be read to diminish the obligations of the federal government and the federal government’s role in supporting post-COVID-19 recovery in Indian Country. The federal response to the pandemic in Indian Country reflects the federal government’s historical failures with respect to its trust obligations.<sup>173</sup> For example, emergency funding intended for tribes under the federal Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) required some tribal governments to sue the federal government for relief.<sup>174</sup> Tribes that did receive CARES Act funds were required to comply with bureaucratic measures and submit data on their members and expenditures that states did not.<sup>175</sup> Even then, tribes had to sue to ensure their fair share of the funding.<sup>176</sup> The failings of the trust relationship rest squarely on the federal government. Those failings include the historical abdication of federal obligation to protect and prevent state encroachment.

In the post-COVID world, there are many ways in which the federal government can improve its policies towards tribal nations beyond improving and honoring its trust obligations. One of the ways in which the federal government could act would be for Congress to affirmatively and definitively preempt state laws, including taxation, in Indian Country. There have been numerous scholarly calls for this federal solution over many years.<sup>177</sup>

Absent federal solutions, or even in conjunction with them, states can also play a positive and affirmative role in helping tribes recover from the disparate impact of the pandemic. And contrary to the historic conflicts between states and tribes, doing so can be approached and achieved in a cooperative and mutually beneficial way.

This section argues that states can adopt tax policies to help promote sovereignty. Those policies include requiring government-to-government consultation, partnering in decision-making, and allowing for primacy of tribal taxation in Indian Country, with specific solutions to address the *Atkinson* problem.

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172. Fernanda Santos, *Life, Death, and Grief in Los Angeles*, N.Y. TIMES MAG. (Mar. 2, 2021), [https://www.nytimes.com/interactive/2021/03/02/magazine/covid-la-county-hospitals-black-latino-residents.html?mc=aud\\_dev&ad- keywords=auddevgate&gclid=Cj0KCQjwkbukBhDRARIsAALysV5DjW-sjMFOqaJr8Dw5dRFVBbMOn-2v3GC8LbxHRxEnQyfCvIANIFiaAqwrEALw\\_wcB&gclsrc=aw.ds](https://www.nytimes.com/interactive/2021/03/02/magazine/covid-la-county-hospitals-black-latino-residents.html?mc=aud_dev&ad- keywords=auddevgate&gclid=Cj0KCQjwkbukBhDRARIsAALysV5DjW-sjMFOqaJr8Dw5dRFVBbMOn-2v3GC8LbxHRxEnQyfCvIANIFiaAqwrEALw_wcB&gclsrc=aw.ds) (quoting Sonja Diaz, founding Director of Latino Policy & Politics Initiative at UCLA).

173. For the historical background, see discussion *supra* Part II.A and text accompanying notes 20–44.

174. The U.S. Supreme Court recently decided a case between the U.S. Department of the Treasury and six tribes over CARES Act funding eligibility in two consolidated cases. *Yellen v. Chehalis Reservation*, 141 S.Ct. 2434 (2021) (holding that Alaska Native regional and village corporations are “Indian tribes” and thus are eligible to receive monetary relief under the CARES Act).

175. Carroll, *supra* note 129. To compound the matter, there was a massive data breach that resulted in the unauthorized disclosure of sensitive data belonging to tribes and their members. *Id.*

176. See *Shawnee Tribe v. Mnuchin*, 984 F.3d 94 (D.C. Cir. 2021).

177. See Cowan, *supra* note 8.

<sup>178</sup> States that adopt these policies will benefit economically in the long term. They will grow their state and local economies, reduce state obligations to provide social safety net services and support within Indian Country, and they will heal the wounds of historic enmity, allowing tribes to flourish in incalculable and intangible ways far beyond economic development.

#### A. States can adopt tax policies to promote tribal sovereignty.

There are two policies states can adopt to help promote tribal sovereignty. First, states can adopt and follow policies requiring meaningful consultation with tribes on matters regarding taxation. That process of consultation will lead to joint decision-making between tribes and states. Second, states can refrain from asserting taxing authority within Indian Country and allow for tribal tax primacy.

##### 1. States should engage in meaningful government-to-government consultation and joint decision-making with tribes.

“Meaningful consultation” refers to governments working as “management partners,” as opposed to adversaries.<sup>179</sup> The policy of the federal government consulting with tribes *prior to* the governmental action is an extension of the trust relationship.<sup>180</sup> Though not arising from official trust obligations, many states have similar consultation requirements with respect to state actions that impact tribes, encouraging cooperative decision-making and promoting tribal sovereignty.<sup>181</sup>

##### a. The origins of consultation and federal executive policies requiring such practices

The notion that tribes should be treated as an equal government was historical practice, evidenced by treaties entered into between various tribes, Britain, and several colonies.<sup>182</sup> The federal government’s trust responsibility with respect to Indian tribes, once described as “domestic dependent nations,”<sup>183</sup> evolved from paternalistic-type actions into a doctrine that “purports to recognize tribal self-determination.”<sup>184</sup>

Contemporary evidence of government-to-government engagement is exemplified through the practice of consultation. President Clinton signed Executive

178. These suggestions are not novel, but current circumstances create a tremendous opportunity for states to shift direction. See Croman & Taylor, *supra* note 98, at 27–29.

179. Michael C. Blumm & Lizzy Pennock, *Tribal Consultation: Toward Meaningful Collaboration with the Federal Government*, 33 COLO. NAT. RES., ENERGY, & ENV’T L. REV. 1 (forthcoming) (manuscript at 5–6) (on file with author).

180. *Id.* at 3–4 (“The government-to-government relationship between tribes and the federal government arise out of the trust doctrine, and government-to-government consultation is a substantial aspect of the relationship.”).

181. See generally Fletcher, *supra* note 3, at 81–83.

182. CANBY, *supra* note 1, at 13.

183. In one of the cases of the Marshall trilogy, *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831), Chief Justice John Marshall compared the relationship between tribes and the federal government as “ward to his guardian.”

184. See Blumm & Pennock, *supra* note 179, at 4, for more on the history of the evolution of the trust doctrine.

Order 13175 in 2000 (the “Executive Order”), implementing official federal policy requiring “regular and meaningful consultations and collaboration” between tribes and the federal government on all “policies that have tribal implications.”<sup>185</sup> Six days after taking office, President Biden issued a Memorandum on Tribal Consultation and reaffirmed the policy directives contained in the original order by President Clinton.<sup>186</sup> The Executive Order first recognizes Indian tribes as sovereign governments.<sup>187</sup> It then requires all federal agencies to respect Indian tribal self-government and sovereignty; honor treaty and other rights; grant discretion to Indian tribal governments; and encourage tribes to set their own policies and establish applicable standards.<sup>188</sup> Furthermore, federal agencies must “have an accountable process to ensure meaningful and timely input by tribal officials.”<sup>189</sup> In practice, this means engaging with the tribes in timely, respectful, and meaningful ways on matters that affect them.

b. Existing consultation policies and practices by state governments

The Executive Order only applies to federal agencies. State policies requiring consultation are neither uniform in existence nor execution. For example, the state of Washington has an official Tribal Consent and Consultation Policy that requires the Washington State Office of the Attorney General to share information as well as identify and address tribal concerns with proposed courses of action that “directly and tangibly affect Tribes, rights, or tribal lands.”<sup>190</sup> Other states also require their agencies to engage with tribes directly through government-to-government consultation.<sup>191</sup>

In practice, despite these statutory or executive mandates for consultation and government-to-government engagement, some states continue to assert power over tribal governments without any demonstration of cooperative spirit. For example, despite Washington state’s requirement that the attorney general consult with tribes, Washington’s Department of Revenue has engaged in protracted legal

185. Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000). The term “policies that have tribal implications,” is defined as regulations, legislative comments, or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.” *Id.* § 1(a).

The foundation for the President Clinton’s Consultation Executive Order was created years prior by President Nixon in an address to Congress in July 1970. President Nixon condemned the policies of termination. Instead, he articulated his administration’s proposals for the federal government to “build upon the capacities and insights of the Indian people,” creating an environment for “the federal government and the Indian community play complementary roles.” Special Message on Indian Affairs, 1970 Pub. Papers 564, 565, 576 (1970).

186. See Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, DAILY COMP. PRES. DOC. 1 (Jan. 26, 2021).

187. Exec. Order No. 13,175, 65 Fed. Reg. 67,249, § 2.

188. *Id.* § 3.

189. *Id.* § 5.

190. WASH. STATE OFF. OF THE ATT’Y GEN., TRIBAL CONSENT & CONSULTATION POLICY, CENTENNIAL ACCORD PLAN (May 10, 2019), <https://www.atg.wa.gov/print/12902>.

191. For citations to a number of states that require agencies to deal with tribes on a “government to government basis,” see Fletcher, *supra* note 3, at 83, nn.81–82, and accompanying text.

battles with tribes over state taxation.<sup>192</sup> This litigation includes a case that went to the United States Supreme Court in 2019 called *Washington State Department of Licensing v. Cougar Den, Inc.*<sup>193</sup> Regardless of what policies exist, such litigation demonstrates that, in practice, states are not adhering to the spirit of the policies.<sup>194</sup>

Washington state is not the only state not adhering to the practice of consultation. In Montana, state law says it is intended “to promote cooperation between the state or a public agency and a sovereign tribal government in *mutually beneficial activities and services.*”<sup>195</sup> Even with this stated intent for mutual benefit, the Montana legislature acted in a manner inconsistent with the stated purpose by amending the law to allow counties to pursue back taxes on tribally held fee land outside the reservation despite strong condemnation of such legislation by tribal leaders.<sup>196</sup> As these examples demonstrate, states continue to encroach on tribal authority without following state declarations of cooperation between the state and tribes. Consultation requirements must not just exist; they must also be adhered to and practiced.

- c. State consultation and joint decision-making with tribes recognizes tribal sovereignty and will lead to cooperative solutions.

As Professor Blackhawk posited, protecting Native peoples has been best accomplished “by bestowing power, not rights, through the recognition of inherent tribal sovereignty.”<sup>197</sup> This functional acknowledgment of power—by consulting and engaging with tribes in joint decision-making—must be done by states and local governments in a consistent and systematic manner.<sup>198</sup>

There is an expectation that the process of consultation results in the shared governance and cooperative sovereignty to ensure solutions that work for all parties. Recognizing and respecting tribal sovereignty goes beyond states merely consulting with tribes about planned courses of action; it requires partnering with tribes to make

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192. See *Tulalip Tribes*, 349 F. Supp.3d 1046, discussed *supra* Part II.B.3; notes 91–96 and accompanying text.

193. 139 S. Ct. 1000 (2019). The issue in *Cougar Den* was construction of the treaty between the Yakima Indian Nation and the federal government and the tax involved was a state fuel tax imposed on wholesalers of fuel sold by a tribal enterprise to tribal members. *Id.*

194. The author is not aware of any discussions, communications, or attempts on behalf of the state of Washington to consult with the tribes in either of the cases, *Tulalip Tribes* or *Cougar Den*, prior to Washington asserting taxing authority over the transactions in those cases. The Washington state policy requiring Tribal Consent & Consultation does not require the Washington Department of Revenue to consult, however it does specifically state that the Attorney general represents “all officials, departments, boards, commissions, and agencies in the state,” and “is involved in a wide array of issues which potentially impact state agencies and tribal governments in their relations with one another.” WASH. STATE OFF. OF THE ATT’Y GEN., TRIBAL CONSENT & CONSULTATION POLICY (2019).

195. MONT. CODE ANN. § 18-11-101(2) (West 1993).

196. See S.B. 214, 67th Reg. Sess. (Mont. 2021).

197. Blackhawk, *supra* note 11, at 1798.

198. See Fletcher, *supra* note 3, at 87 (“Each time a state or local government agrees to negotiate with an Indian tribe and then to execute a binding agreement with an Indian tribe, that non-Indian government is recognizing the legitimacy of the tribal government.”).

joint decisions.<sup>199</sup> Common characteristics in successful tribal economies include principles of sovereignty.<sup>200</sup> Specifically, non-indigenous governments, such as the state and local governments adjacent to a tribe, can best promote the tribe's economic development by serving in a "resource role."<sup>201</sup> As resources, state and local governments ought to move "from consultation to partnerships," where the two sovereigns make joint decisions in areas of overlapping interest.<sup>202</sup>

d. Consultation is distinct from compacting.

Compacting and consultation, though they share attributes, are not the same thing. Consultation represents engagement by a state, local, or federal government with a tribal government to work with the tribe regarding issues that have implications for the tribe.<sup>203</sup> Compacting is an inter-governmental agreement between tribes and states that resolves an issue of overlapping, or potentially overlapping, jurisdiction.<sup>204</sup> Compacting necessarily requires engagement between sovereigns and the recognition of inherent sovereignty between the negotiating parties.<sup>205</sup> Compacting usually requires concessions between the state and tribal governments as to their rights as sovereigns—since the purpose of compacting has been to avoid the consequences of each party imposing its own tax.<sup>206</sup> Consulting does not have to lead to such concessions by tribes. As argued below, consultation and joint decision-making between tribes and states could lead to primacy of tribal taxation in Indian Country which may improve state and local economies too.<sup>207</sup>

Compacting has been a useful tool for tribes and states as an extrajudicial solution to the problems of double taxation while working with the constraints of the jurisprudence. However, it is not sufficient to ensure full sovereignty for tribes. Compacting does not ensure that tribes can attract business *and* raise revenue to pay for the infrastructure and other costs necessary to attract business investment because the terms of compacts often vary as to revenue amount and allocation. The district court in *Tulalip Tribes* acknowledged this when it listed the tribal interests and found that the Tribe was still able to build the commercial center, but not "collect the full measure of its own sales tax from the non-Indian businesses."<sup>208</sup> Backed into a corner and facing the reality of a zero-sum tax revenue outcome from litigation, the Tulalip Tribe recently entered into a compact with the state of Washington and Snohomish

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199. Stephen Cornell & Joseph P. Kalt, *Two Approaches to the Development of Native Nations: One Works, the Other Doesn't*, in REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 3, 27–28 (2007).

200. *Id.* at 19–22.

201. *Id.* at 27.

202. *Id.* at 28.

203. See Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67249 (Nov. 6, 2000).

204. Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 HARV. L. REV. 922, 924 (1999).

205. See Cowan, *supra* note 8, at 133–34; *infra* notes 214–215 and accompanying text.

206. See Cowan, *supra* note 8, at 135; *infra* notes 216–219 and accompanying text.

207. See *infra* Parts III.A.2. & B.

208. 349 F. Supp. 3d 1046, 1059 (W.D. Wash. 2018).

County to mitigate this result.<sup>209</sup> Thus, compacting is not sufficient to resolve the economic needs of tribes brought to light by the pandemic. Consultation and joint decision-making are necessary to promote tribal sovereignty.

2. *States should promote primacy of tribal taxation in Indian Country.*

The next step beyond consultation and joint decision-making is for states to allow for primacy of tribal taxation in Indian Country.<sup>210</sup> If state and local governments allowed tribal primacy in taxation, all the collateral consequences to tribal economies that occur when state and local governments tax transactions occurring within Indian Country would be alleviated. If states and localities deferred to tribes and refrained from asserting their potential taxing authority, tribes would not only benefit from their own tax revenues, but they would also retain the ability to attract outside investment, furthering the tribes' economic development.<sup>211</sup> Recognizing tribes as primary and appropriate sovereigns to exercise taxing authority over transactions that the state could possibly tax would allow them to grow their tax bases, increase economic development, and better provide for their members.<sup>212</sup>

A common objection to primacy by state and local governments is that tribes will “market [their] exemption,” as an enticement to draw business to the reservation.<sup>213</sup> First, it is important to note that the framework of deferring to tribes and offering tribal primacy does create a possibility of a tribe imposing a lower rate of taxation or imposing no tax at all. Doing so would create the possibility of economic distortions regarding consumer behavior that make for poor tax policy.<sup>214</sup> Tribes need both sides of the economic development coin—they need the tax revenue generated by the tax base of reservation businesses and investments. Furthermore, there is the chance that, with government-to-government consultation and “cooperative sovereignty,” tribes and states can arrive at neutral, non-distortive tax policies that avoid a “race for the bottom.”<sup>215</sup>

Finally, this argument has veiled racist arguments used by a dominant culture to justify or moralize the legacy of injustices against historically marginalized

209. *Retail Taxes Compacts*, WASH. ST. DEP'T OF REVENUE, <https://dor.wa.gov/taxes-rates/retail-sales-tax/retail-taxes-compacts>; Jerry Cornfield, *Deal Ends Legal Fight and Allows Tulalips a Cut of Sales Tax*, HERALDNET, EVERETT, WASH. (Jan. 29, 2020, 9:13 PM), <https://www.heraldnet.com/news/deal-ends-legal-fight-and-allows-tulalips-a-cut-of-sales-tax/>.

210. These suggestions are not novel, but current circumstances create a tremendous opportunity for states to shift direction. See Croman & Taylor, *supra* note 98, at 27–29.

211. The economic studies also support the position that when states cede taxing authority, there is the collateral benefit of reducing conflict between tribes and states. *Id.* at 28–29.

212. *Id.* at 14.

213. Fletcher, *supra* note 7, at 804 (noting that this objection ignores the reality that this problem exists in multistate taxation and argues that tribes should be able to do so if necessary).

With globalization of economies and businesses, there is a movement away from allowing countries to market the exemption in the international tax arena. See Alan Rappeport, *Finance Leaders Reach Global Tax Deal Aimed at Ending Profit Shifting*, N.Y. TIMES (June 5, 2021), <https://www.nytimes.com/2021/06/05/us/politics/g7-global-minimum-tax.html> (discussing an agreement among the “Group of [Seven]” nations to back global minimum tax).

214. See Barsh, *supra* note 3, at 544; Part II.B.3, *supra* notes 97–109 and accompanying text.

215. See *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2481 (2020).

peoples.<sup>216</sup> Allowing for primacy of tribal tax would resolve any such implications in favor of deferring to tribal sovereignty and self-determination.

3. *State and local governments will need to adopt specific policies to address the Atkinson problem.*

The *Atkinson* problem—a tribe lacking taxing authority over a non-Indian business located on land owned by non-Indians within a reservation—cannot be addressed by giving a tribe primacy of taxation because the tribe has been stripped of that authority as a legal matter. The solution to such a problem has similar attributes as the solution to the problems where there is overlapping, or at least potentially overlapping, jurisdiction to impose tax.

Instead of deferring to tribes to create a policy, the *Atkinson* problem requires states to consult with tribes and work with the tribe to impose a similar state or local tax as the tribe imposes. This correction will ensure a tax neutral result and minimizes distortions that result from the checkerboard pattern of ownership resulting from Allotment-era policies. This policy solution has support from the recent opinion in *McGirt v. Oklahoma*.<sup>217</sup> In *McGirt*, the Court held in favor of territorial sovereignty as opposed to focusing on the status of land ownership within the Tribe's reservation.<sup>218</sup>

**B. States and local governments will face obstacles in implementing the suggested policies.**

It would be naïve to believe that state and local governments will be eager to adopt these policies. Certainly, many states and local governments will be reluctant to consult, make joint decisions, or cede authority to neighboring tribal governments. States and local governments may fear losing precious state and local revenue streams and lack of political will.

Data gathered early in the COVID-19 pandemic indicated decreases in state and local government revenue.<sup>219</sup> The American Rescue Plan, however, provides immediate relief in the short term for state and local governments. And such relief can create flexibility and freedom for state and local governments to think about the long-term economic interests of their governments and citizens.

Political will, on the other hand, is a more challenging problem to overcome. Voters may be skeptical of deference to tribes. Certainly, historically, some voters in states that compact have viewed revenue sharing as unfavorable.<sup>220</sup> An initial shift from policies of competition with tribes toward principles of “comity

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216. See Fletcher, *supra* note 7 at 785–87; *supra* note 185 and accompanying text.

217. 140 S. Ct. 2452.

218. *Id.* at 2481. The opinion in *McGirt* does not change the rule articulated in *Atkinson*; rather the focus and outcome may signal a shift from modern jurisprudence back to territorial jurisdiction. See Dylan R. Hedden-Nicely & Stacy L. Leeds, *A Familiar Crossroads: McGirt v. Oklahoma and the Future of the Federal Indian Law Canon*, 51 N.M. L. REV. 300 (2021).

219. Alan Auerbach, Bill Gale, Bryon Lutz & Louise Sheiner, *Fiscal Effects of COVID-19*, BROOKINGS PAPERS ON ECON. ACTIVITY, Sept. 24, 2020, at 1, 22–25.

220. Cowan, *supra* note 8, at 135.

and cooperative sovereignty,” may require diplomacy and finesse.<sup>221</sup> But, just as the Supreme Court was more receptive to reconsidering territorial sovereignty in *McGirt*, non-Indians living in proximity to tribes may also come around to reconsidering it if economic conditions improve for everyone.<sup>222</sup> In *McGirt*, the Supreme Court inferred that states and tribes ought to be considering working as partners.<sup>223</sup> Perhaps if the Supreme Court can reverse course, the political will can too.

Finally, critics may quickly ask about the type of enforcement there is for state and local governments who do not engage in these type of collaborative sovereignty policies. This article does not contain policy prescriptions that should be authoritatively adopted. As Professor Blackhawk noted, the access to the legislative and executive branches have been where Indian law has seen most success.<sup>224</sup> The “ability to access the lawmaking process” in an extra-judicial manner, has “provided sanctuary” for tribal governments.<sup>225</sup> Here too, the prescriptions should be seen to inform law and policy makers to look to the longer-term horizon.

### C. Reasons why states and local governments ought to adopt these policies.

Far from an all-or-nothing proposition, states will not sacrifice their potential tax revenues in vain. Economic studies show that growth on reservations benefits state economies in two ways.

#### 1. Tribal economic growth correlates to overall economic growth within the states and local areas.

Data from researchers in the field of economic development specific to Indian Country show that, when tribal economies grow, state and local economies have corresponding growth. Data shows that reservation economies contribute to “broader regional and national economies.”<sup>226</sup> Both tribal governments and reservation businesses spend significant money off reservations.<sup>227</sup> A study in 1998, reported that tribes spend \$1.2 billion and reservation businesses spend \$4.4 billion off-reservation.<sup>228</sup> The spending by tribes, reservation businesses, and tribal residents created \$246 million in state and local tax revenue and \$4.1 billion in federal tax revenue on an annual basis.<sup>229</sup>

Data analyzing regional economic impact of tribal economic development indicates that tribes such as the Mississippi Choctaw, Citizen Potawatomi, and Winnebago of Nebraska are “dominant economic forces in otherwise relatively poor

221. *McGirt*, 140 S. Ct. at 2481.

222. If economic conditions improve for both tribes and their members and the non-Indian community adjacent to tribal nations, the quote by James Carville comes to mind: “It’s the economy, stupid.” *It’s the Economy, Stupid*, POL. DICTIONARY, <https://politicaldictionary.com/words/its-the-economy-stupid/>.

223. 140 S. Ct. at 2481 (“[I]t is unclear why pessimism should rule the day.”).

224. Blackhawk, *supra* note 11, at 1799.

225. *Id.*

226. See HARVARD PROJECT ON AM. INDIAN ECON. DEV., THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION, 118 (Oxford Univ. Press 2008).

227. *See id.*

228. *Id.* at 118 & 140 n.12 and accompanying text.

229. *Id.* at 118.



and rural settings.”<sup>230</sup> One reason for the economic impact on the entire region where the tribes are located geographically is that the tribes often employ “large numbers of non-Indians,” along with the tribe’s own citizens.<sup>231</sup>

Other data from the state of Washington corroborates the finding that tribal economic growth correlates to growth in the broader local and state economies. A report on the twenty-seven tribes located within Washington state from 1997, showed contribution of \$1 billion to the economy.<sup>232</sup> This \$1 billion was made up by tribal enterprises that purchased \$865.8 million in goods and services, tribes that paid \$51.3 million in federal employment and payroll taxes, and \$5.3 million in state employment and payroll taxes on employment of over 14,000 individuals, many of whom were non-Indian.<sup>233</sup>

Even if state and local governments adopt these policies and refrain from imposing, or attempting to impose, taxation within Indian Country, thriving businesses in Indian Country will not develop overnight. Recent scholarship explains how tribes can look to “historical and traditional customs, laws, values, behaviors, structures, and mechanisms for engaging in economic activities.”<sup>234</sup> State taxation is but one hinderance in that overall pursuit.<sup>235</sup>

2. *Improved tribal economic conditions reduce tribal poverty which lessens the burden on state social services.*

Data regarding the economic status of individuals residing on reservations “highlight[s] the crucial need” of tribal governments to create sustainable economies sufficient to pull their members out of poverty.<sup>236</sup> In *Tulalip Tribe v. Washington*, the federal district court entertained testimony at trial regarding state and local government allocations of revenue that went to pay for education, social services, and other general services that were available to members of the Tulalip Tribe.<sup>237</sup> In doing so, the court realized that it was impossible to quantify and weigh the “relative value of what are patently unquantifiable services provided by [the Tribe, state, and county].”<sup>238</sup> As tribes are better positioned economically to provide for its citizens, state and local governments will be relieved of whatever portion of the burden of social services they carry. Known as the “multiplier effect,” as tribal economies

230. *Id.* at 119.

231. *Id.*

232. *Id.*

233. *Id.* at 119–20 & 140 n.13 and accompanying text.

234. Robert J. Miller, *Sovereign Resilience: Reviving Private-Sector Economic Institutions in Indian Country*, 2018 B.Y.U. L. REV. 1331, 1334 (2018).

235. Crepelle, *supra* note 7, at 1000 (“Several factors contribute to Indian country’s economic despair, but state taxation of Indian country commerce is the most severe impediment.”).

236. Miller, *supra* note 233, at 1335. For a thorough explanation of current economic conditions in Indian Country, including data on unemployment, lack of educational opportunities, housing, basic infrastructure, and overall poverty levels, see *supra* note 233, at 1335–38. *But cf.* Carroll et al., *supra* note 129, for critical commentary on data erasure of indigenous peoples.

237. 349 F.Supp.3d 1046, 1060–62 (W.D. Wash. 2018).

238. *Id.* at 1061–62.

develop and flourish in both public and private sectors, conditions will improve within Indian Country.<sup>239</sup>

### 3. *Process of healing wounds of historic enmity*

Beyond improving state and local economies, or easing the burden of state social services, adopting these policies can help heal the wounds of historic enmity and the recent shared tragedy of COVID-19. The value of healing wounds cannot be quantified or measured in dollars, but that does not make it any less real.

A tribe's ability to self-govern is the foundation for sustainable economic development.<sup>240</sup> But self-governance, self-determination, and sovereignty create conditions in which tribes can develop so much more than economic development. With increased ability to self-govern, tribes and their peoples will see improvements in health outcomes, cultural and spiritual engagement, educational opportunities, and a broad range of social-economic indicators.

State and local governments can help promote tribal sovereignty by engaging in meaningful consultation, joint decision-making, and by allowing for tribal tax primacy. Doing so will create economic benefits for tribes and states alike and it will also have non-economic benefits for tribes.

## IV. CONCLUSION

If the study of Indian law teaches one broad principle, it is that no current situation in Indian Country occurs in a vacuum.<sup>241</sup> The reaches of state taxation, and limits on a tribe's taxation authority, are shaped not only by history, but also by the COVID-19 pandemic.

Professor Fletcher argued for “[r]etiring the deadliest enemies model,”<sup>242</sup> Professor Blackhawk provided a framework for doing so; and even the Supreme Court is encouraging tribal-state cooperative sovereignty.<sup>243</sup> State and local governments should adopt tax policies that ensure consultation and joint decision-making with tribal governments. State and local governments should allow for primacy of tribal taxation within tribal territories, promoting territorial sovereignty. Long-term economic benefits to both tribes and states will outweigh any short-term revenue losses to state and local governments. Instead of competing for a zero-sum taxing authority, tribes and states can become partners to ensure economic protection against future pandemics and to resolve the historic trauma of colonialism.

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239. Miller, *supra* note 233 (citing to economic literature on the “multiplier effect.”). This type of economic growth will “keep [] money circulating and re-circulating in Indian country creat[ing] more businesses, more jobs, more income, and better conditions for everyone.” Miller, *supra* note 233.

240. HARVARD PROJECT ON AM. INDIAN ECON. DEV., *supra* note 225, at 121 (“Comparative research across a spectrum of tribal contexts has found that successful economic development is most likely to occur when tribes effectively assert their sovereignty and back up such assertions with capable and culturally appropriate institutions of self-government.”).

241. See Cohen *supra* note 1, at 5 (“Indian law and history are the opposite sides of the same coin.”).

242. Fletcher, *supra* note 3.

243. *McGirt v. Oklahoma*, 140 S.Ct. 2452, 2481 (2020).