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Sacrificing Sovereignty: How Tribal-State Tax Compacts Impact Economic Development in Indian Country

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Articles

Sacrificing Sovereignty: How Tribal-State Tax Compacts Impact Economic Development in Indian Country

PIPPA BROWDE[†]

Economic development is a critical component of tribal sovereignty. When a state asserts taxing authority within Indian Country, there is potential for overlapping, or juridical, taxation over the same transaction. Actual or even potential juridical taxation threatens economic development opportunities for tribes. For many years, tribes and states have entered into intergovernmental agreements called tax compacts to reduce or eliminate juridical taxation. Existing literature has done little more than mention tax compacts with cursory cost-benefit analyses of the agreements. This is the first Article to critically examine the role tax compacts serve in promoting tribes' economic development.

This Article analyzes economic development activities in Indian Country as two types of transactions: when the tribe or tribal enterprise is engaging as a retailer, and when a tribe or tribal enterprise is working with non-tribal entities in joint ventures. Using these categories of transactions as a framework, and looking to existing compacts between various tribes and states as examples, the analysis focuses on the impact compacts have on economic development in Indian Country. This Article argues that compacts do not live up to the promise of resolving juridical taxation in a manner that fosters economic development opportunities for tribes.

[†] Professor of Law, Alexander Blewett III School of Law, 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 the Blackfeet, Nez Perce, Shoshone, Bannock, and Coeur D'Alene, had and continue to have a presence in the area. This Author and the University of Montana acknowledge the role the U.S. 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. This Author thanks Dean Kevin Washburn for early conversations that set the course for this study of tribal-state tax compacts. This Author also thanks participants of the Junior Tax Scholars Workshop at the University of Colorado who read an earlier draft of this Article, as well as Mitch WerBell V and Jacqueline Baldwin LeClair for student research.

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INTRODUCTION

In seeking to assert civil regulatory authority in Indian Country,¹ state and local governments encroach on tribal jurisdiction and sovereignty.² When a state asserts its taxing authority within Indian Country, there are serious implications for tribal economic development.³ Economic development in Indian Country is

1. A note on terminology is warranted at the outset. In an effort to be consistent with the field of Federal Indian law, this Article uses the terms “Indians,” “Indian tribes,” and “Indian Country,” as follows. Under federal law, the terms “Indian tribes” or “Indian Nation” commonly refer to a group of Indigenous Americans the federal government recognizes as a group, or with whom the federal government has a political relationship. FELIX S. COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[2] (Nell Jessup Newton ed., 2017). “Indian tribe” may also have an enhanced meaning to its members beyond political status that includes shared cultural, religious, and linguistic elements, and a shared relationship to specific land. *Id.* Under federal law, the term “Indians” refers to individual Indigenous Americans, and is a political delegation. *Id.* § 3.03[4]; Morton v. Mancari, 417 U.S. 535, 551–55 (1974). There is no singular definition of “Indians,” which depends on the legal context. COHEN, *supra*, § 3.03. Although there has been a trend toward referring to tribal members as “Native American” or “Indigenous,” the term “Indians” is commonly used to refer to Indigenous American people as a group, as it is in this Article. Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003, 1003 n.1 (1995). The term “non-Indians” refers to individuals who are not Indian, whereas “nonmember Indians” refers to individuals who are Indian but not members of the specific tribe or tribal territory where the tax is imposed. COHEN, *supra*, § 8.06 (explaining how the law on non-Indians and nonmember Indians are the same for purposes of the reach of state taxation in Indian Country). The term “Indian Country” refers to the geographic area where Indian laws and customs and federal laws relating to Indians generally apply. *Id.* § 3.04[1]. Indian Country is broadly defined to include “formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States.” *Id.* (citing Okla. Tax Comm’n v. Sac & Fox Nation, 508 U.S. 114, 123 (1993)). The question of land status and whether a transaction occurs within Indian Country is of critical importance to the analysis of taxation authority. For a detailed explanation beyond the scope of this Article, see Erik M. Jensen, *Taxation and Doing Business in Indian Country*, 60 ME. L. REV. 1, 9–13 (2008). Though there are general principles of Federal Indian law that relate to state taxation in Indian Country, Indian tribes are not a homogenous group. There are 574 federally recognized Indian tribes in the United States, each with its own legal structure, laws and rules, culture, and economy. Indian Entities Recognized by and Eligible To Receive Services from the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636, 4636 (Jan. 28, 2022) [hereinafter Indian Entities]; see also 25 C.F.R. § 83.6(a) (2015). References to “Indian Country” as a general geographic location denote a specific tribe with a specific group of members. See Indian Entities, *supra*.

2. Disputes between states and tribes over the extent of a state’s jurisdiction over tribal lands or members have existed since the early founding of our nation. Among other legal issues, *The Cherokee Cases* involved the state of Georgia’s attempts to enforce its laws over Cherokee territory. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 2 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 520 (1832); see also Rennard Strickland, *The Tribal Struggle for Indian Sovereignty: The Story of the Cherokee Cases*, in INDIAN LAW STORIES 61 (Carole Goldberg, Kevin K. Washburn & Philip P. Frickey eds., 2011). In fact, disputes between states and tribes predate the U.S. Constitution and may have shaped the Constitution’s federalist structure. Professor Richard D. Pomp’s article, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 TAX LAW. 897 (2010), examines the history of the Indian Commerce Clause, including the tensions that existed between colonists and centralized control by the Crown with respect to Indian affairs. “Disputes between some of the Southern states and certain Indian tribes continued after the [Revolutionary War] and underscored the need for a strong national government that could impose order.” *Id.* at 932. These disputes occupied the United States Supreme Court’s docket in the nation’s early years, and more than 200 years later, the Court is still hearing the same types of disputes. In 2019, the Supreme Court considered two cases in which the central issue was the application of state law in Indian Country. See Wash. State Dep’t of Licensing v. Cougar Den, Inc., 586 U.S. 1, 14–18 (2019) (holding a Washington state tax on motor fuel wholesalers preempted by a treaty between the United States and the Yakama Indian Nation); *Herrera v. Wyoming*, 587 U.S. 1, 17 (2019) (holding that Crow Tribe members have treaty rights to hunt on unoccupied lands outside the Tribe’s reservation despite Wyoming hunting laws to the contrary).

3. See *infra* Part I.B.

already tricky business. A number of factors, including lack of infrastructure, uncertainties in the application of commercial law, complications with transacting on land held in trust by the federal government, barriers to capital and lending, and geographic isolation, all work against a tribe seeking to attract investment and foster economic development.⁴ In addition to these challenges, the uncertainty of the tax consequences of various transactions can chill business opportunities for tribes and discourage non-Indians who wish to do business in Indian Country.⁵

The United States Supreme Court's jurisprudence on what, where, when, and how a state may impose its taxing authority in Indian Country may be one of the most complex and unpredictable legal issues tribes and states continue to face today.⁶ Because this vexing problem only seems to lead to litigation, tribes and states are often motivated to engage in intergovernmental agreements, called compacts, to preemptively resolve potential tax conflicts.⁷

Most of the existing literature on taxation in Indian Country has focused on when more than one sovereign (i.e., the state and a tribe) claim legal authority to tax the same transaction. This double taxation problem is called juridical taxation.⁸ Juridical taxation in Indian Country creates numerous problems for tribes seeking to create economic development opportunities and for states seeking to enforce taxing authority within tribal territories. It also puts pressure on tribes to choose between tax revenue and economic development.⁹

Tribal-state tax compacts are heralded as a cooperative and positive mechanism for tribes and states.¹⁰ The compacts are both a sacrifice and expression of sovereignty for tribal governments.¹¹ Tax revenue compacts enable tribes to control, at least to some degree, their sovereignty from state

4. 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, 95 (2005); Adam Creppelle, *How Federal Indian Law Prevents Business Development in Indian Country*, 23 U. PA. J. BUS. L. 683, 691–92 (2021).

5. The uncertainties of the tax consequences of transactions in Indian Country are discussed *infra* Part I.B.3.

6. See Pomp, *supra* note 2, 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.”).

7. See *infra* Part I.C.

8. MINDY HERZFELD, INTERNATIONAL TAXATION IN A NUTSHELL 5 (12th ed. 2020) (defining juridical taxation as the existence of “[o]verlapping claims of taxing authority”). The seminal work in this area is by Professor Richard D. Pomp. See Pomp, *supra* note 2; see also Cowan, *supra* note 4, at 95; 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, 872–73; Russel Lawrence Barsh, *Issues in Federal, State, and Tribal Taxation of Reservation Wealth: A Survey and Economic Critique*, 54 WASH. L. REV. 531, 571 (1979); 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, 503 (1999).

9. See *infra* Part I.B.3.

10. See Cowan, *supra* note 4, at 133–36.

11. See *infra* Part I.C.1.

encroachment.¹² They also help tribes control and maintain economic development within their territories.¹³ For states, compacts are a way to protect some of their revenue bases and eliminate cross-territorial enforcement problems.¹⁴ For both tribes and states, compacts provide certainty.¹⁵ However, the question remains how compacts impact economic development opportunities for tribes.

This Article is the first to critically examine the relationship between tax revenue compacts and economic development opportunities for tribes. It argues that compacts do not live up to their promise of resolving juridical taxation in a way that promotes the economic development activities and opportunities that tribes need.

Part I provides necessary background on the history of Indian law and policy that set the stage for state taxation in Indian Country. This historical background includes an explanation of the law on tribal-state tax compacts, as well as specific examples of compacts used to address juridical taxation. Part II categorizes economic development activities in Indian Country into two types of transactions: (1) where the tribe or tribal entity acts as a retailer, directly transacting with customers or consumers, and (2) where the tribe partners with non-tribal entities or businesses to create economic ventures. These transaction categories are used to analyze the impact compacts have on economic development in Indian Country. Part II then analyzes the impact compacts have on tribal economic development activities in three movements. First, using the two categories of transactions identified, Part II examines the parties' incentives to compact and correlates them with economic development opportunities. Second, applying tax policy principles, it explores the negative impact compacts have on economic development. Third, it then offers a framework other than compacting for resolving juridical taxation in Indian Country that deserves further research.

I. BACKGROUND

Tax revenue compacts are touted as practical solutions to the legal problem of determining the scope and limits of tribal and state taxing authority within Indian Country.¹⁶ To understand and analyze the value of these compacts, background on existing law and policy is necessary. Current law and policy are

12. See *infra* Part I.C.1.

13. See Cowan, *supra* note 4, at 134.

14. See *infra* Part I.C.2.

15. For early work focused on cataloguing compacts, see generally COMMISSION ON STATE-TRIBAL RELATIONS, STATE-TRIBAL AGREEMENTS: A COMPREHENSIVE STUDY (1981). For work advocating the wider use of compacts, see David H. Getches, *Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding Self-Government*, 1 REV. CONST. STUD. 120, 147 (1993). For focus on how model compacts help tribes with lesser bargaining power, see Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 HARV. L. REV. 922, 936 (1999) [hereinafter *Intergovernmental Compacts*].

16. See Cowan, *supra* note 4, at 133.

inextricable from the history of colonialism and the historical relationship between Europeans and tribes. Thus, this Article starts with background on the history of Indian law and policy, then turns to existing law on state taxation in Indian Country. It then describes the effect of existing law on tribal economic development and provides background on tribal-state tax compacts.

A. THE HISTORY OF INDIAN LAW AND POLICY SETS THE STAGE FOR STATE TAXATION IN INDIAN COUNTRY.

The history of Indian law and policy is normally broken down into multiple “eras” of policy.¹⁷ For purposes of this abbreviated background, it is divided into the following eras: colonial times and formative era, post-treaty-making through allotment, Indian reorganization and termination, and self-determination.¹⁸

1. *Indian Law and Policy Beginning in Colonial Times Through the Middle of the 1800s*

Prior to European contact, tribes were “independent [and] self-governing.”¹⁹ Post-contact, tribal sovereignty was reduced by European colonialists who imposed their own legal constructs on the Indigenous Americans.²⁰ This is the starting point for understanding the evolution of tribal sovereignty and the three-way relationship between tribes, the U.S. government, and the states.

The early U.S. government, first with the Continental Congress and later the Senate, negotiated treaties with tribes to make peace following the

17. See generally, e.g., Kevin Washburn, *What the Future Holds: The Changing Landscape of Federal Indian Policy*, 130 HARV. L. REV. 200 (2017).

18. This breakdown appears somewhat random. This randomness reflects the vacillation in how the federal government has respected tribal sovereignty and treated tribal governments. There are vacillations within the second era as policy shifted from allotment to reorganization and back to termination. See *infra* Part I.A.3. More importantly, a reader unfamiliar with Indian law should note that this is only the briefest history of the past 500 years, a subject to which entire books are devoted. The seminal treatise of *Cohen’s Handbook of Federal Indian Law* contains an entire chapter on this history. See COHEN, *supra* note 1, § 1.01; see also generally CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* (2005); PHILIP J. DELORIA & NEAL SALISBURY, *A COMPANION TO AMERICAN INDIAN HISTORY* (Philip J. Deloria & Neal Salisbury eds., 2008).

19. COHEN, *supra* note 1, § 4.01[1][a]. The term “sovereignty,” means, “[a]t its most basic, . . . the inherent right or power to govern.” WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 73 (6th ed. 2015). The foundations for tribal sovereignty existed before European contact with the Americas. *Id.* (“[T]ribes 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.”).

20. “The present right of tribes to govern their members and territories flows from a preexisting sovereignty limited, but not abolished, by the tribes’ inclusion within the territorial bounds of the United States.” COHEN, *supra* note 1, § 6.02[1]. As evidenced by the history of brutality with which colonial Europeans treated Indigenous Americans, the legal theories were not uniform in respecting tribal sovereignty and ownership of land by tribes and their members. *Id.* § 1.02[1] & nn.2–22 (explaining early doctrines that shaped European relations with American Indians). It is important to note that while European conquistadores treated Native American Indians with brutality, their behavior often was inconsistent with or violated Spanish law, which did in fact recognize the property and liberty rights of Native American Indians. *Id.* § 1.02[1] & nn.18–23.

Revolutionary War.²¹ Early treaties reflected diplomatic agreements to end hostilities between governments, create political alliances, delineate criminal jurisdiction, and facilitate trade.²² These treaties reflected the United States' desire to "bury the hatchet" with Indian Nations to establish peace and negotiate territorial boundaries.²³ After the adoption of the Constitution, for the next eighty years, the United States engaged in treaty-making with Indian tribes.²⁴ Treaties are still relevant today. They are binding law that apply between the parties, usually the U.S. government and a tribe (or tribes). In analyzing these treaties, courts invoke special canons of construction construing ambiguities in favor of the tribes; construe treaties as specific grants of rights from the tribes, with all other rights reserved to the tribal treaty-partner; and cannot find abrogation without evidence of clear congressional intent.²⁵

Treaties with tribes are similar in some respects to U.S. treaties with foreign nations, such as containing terms relating to diplomacy, peace, and exchange of prisoners.²⁶ However, treaties with tribes differ in that many address tribes as dependent nations, providing protection and containing terms regarding the tribe's cession of land to non-Indians.²⁷

The three-way relationship between tribes, states, and the federal government was initially delineated by Supreme Court jurisprudence.²⁸ In two of the Court's early cases, *Cherokee Nation v. Georgia*²⁹ and *Worcester v. Georgia*,³⁰ the Court recognized the unique political status of tribes as self-governing, referring to them as "domestic dependent nations" within the United States.³¹ Specifically, the Court cited existence of early treaties between tribes and European nations as evidence of tribal sovereignty that ought to be respected by the United States.³²

21. COHEN, *supra* note 1, § 1.02[2] & n.71; *see also* Pomp, *supra* note 2, at 929–31 & nn.121–30 (explaining the history of constitutional language pertaining to Indian tribes).

22. COHEN, *supra* note 1, § 1.02[2] & n.76 (offering the example of the first written treaty between the Delaware Tribe and the United States).

23. *Id.* § 1.02[3] & nn.84–85.

24. *Id.* § 1.03[1] & n.1.

25. *Id.* § 1.03[1] & nn.3–5.

26. *Id.* § 1.03[1] & nn.12–23.

27. *Id.* § 1.03[1] & nn.24–34.

28. *See* *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 20 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). *Cherokee Nation v. Georgia* and *Worcester v. Georgia*, two early Supreme Court cases setting forth the legal relationships between the three governments, are two out of the three cases referred to as the Marshall Trilogy, because they were authored by then-Chief Justice John Marshall. *Johnson v. M'Intosh* is the first case of the Marshall Trilogy. 21 U.S. (7 Wheat.) 543 (1823). In *Johnson*, the Court considered the relationship between the federal government and tribal governments. *Id.* at 598. While there are important questions and legal issues arising from the relationship between tribes and the federal government, they are beyond the scope of this Article.

29. *Cherokee Nation*, 30 U.S. at 17.

30. *Worcester*, 31 U.S. at 583.

31. *Cherokee Nation*, 30 U.S. at 2.

32. *Worcester*, 31 U.S. at 551–53.

Additionally, *Cherokee Nation* and *Worcester* affirmed the United States' assertion of supremacy over Indian affairs.³³ In both cases, the Court considered the applicability of Georgia state law within Indian Country.³⁴ An aspect of federal supremacy that the Court construed was the intent to “preserve[]” and “insulate[] [tribal governments] from state interference.”³⁵ In *Worcester*, the Court famously stated that, absent some treaty or congressional action, “the laws of Georgia can have no force” unless agreed upon by the Cherokee tribe itself.³⁶ Unfortunately, as subsequent history and case law bore out, *Worcester* did not resolve the tension between the boundaries of state and Indian Country jurisdictions.³⁷

2. *The End of Treaty-Making Through the Era of Allotment*

The formative era of Federal Indian law ended in 1871, with the U.S. government no longer dealing with tribes through treaties.³⁸ Rather, the United States began legislating policy with respect to Indian Nations as opposed to treaty-making. The most marked shift from the past practice of treaty-making came in 1887 with the passage of the General Allotment Act.³⁹ The Act “change[d] the role of Indians in American society,”⁴⁰ by changing the ownership structure of tribal land from tribally owned property to allotting portions to individuals.⁴¹

Posited as a mechanism to “civilize and assimilate” Native American Indian people, the reality of allotment was a loss of land ownership by tribes and their members.⁴² Allotment created checkerboard patterns in ownership on reservations, where some land was owned by non-Indians.⁴³ The allotment era resulted in an enormous loss of land for Native American Indians.⁴⁴ In 1887, tribes and tribal members collectively owned approximately 138 million acres.⁴⁵

33. *Id.* at 561; *Cherokee Nation*, 30 U.S. at 17.

34. *See Cherokee Nation*, 30 U.S. at 3; *Worcester*, 31 U.S. at 521.

35. COHEN, *supra* note 1, § 4.01[1][a].

36. *Worcester*, 31 U.S. at 561.

37. The language of the Supreme Court's jurisprudence only tells one dimension of the full story. After the Supreme Court's opinion delivered a win for the Cherokee people, Georgia refused to acknowledge and follow the law. *See Strickland, supra* note 2, at 75–76. Furthermore, President Andrew Jackson did not enforce the law as interpreted by the Supreme Court and removed the Cherokee people in the Trail of Tears. *Id.* at 76–79.

38. COHEN, *supra* note 1, § 1.03[9] & nn.351–61. But see *id.* for an explanation of how the shift was procedural in nature and did not invalidate existing treaties or other non-legislative policy developments.

39. Pub. L. No. 49-119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 334, 339, 341–342, 348–349, 354, 381).

40. COHEN, *supra* note 1, § 1.04 & nn.5–6.

41. *Id.* § 1.04 & n.8.

42. *Id.* § 1.04 & nn.10–15. The rules and process for allotment were complex, and included Indian sales of land. *Id.*

43. *Id.* § 1.04 & nn.9–10.

44. *Id.* § 1.04 & n.11.

45. *Id.* § 1.04 & nn.7–8.

Within fifty years of allotment policy, the amount of land was reduced to forty-eight million acres.⁴⁶

The allotment era policies also included forced cultural assimilation.⁴⁷ For example, in 1924, federal legislation conferred U.S. citizenship upon all Native American Indians born within the territorial jurisdiction of the United States.⁴⁸

3. *Reorganization Through Termination*

The failures of the allotment era were reflected in a policy shift in the mid-1920s. This shift was toward so-called “Indian Reorganization,” in which the federal government sought to revitalize tribal governments, and tribes were encouraged to engage in economic development.⁴⁹ The general theme of Indian Reorganization policies was similar to those of the New Deal era, encouraging tribes to engage in nation-building by offering educational, technical, and employment programs to tribal members.⁵⁰ Though the impact on tribal self-governance during the Indian Reorganization era was “debatable,” and widespread poverty persisted on reservations, Indian Reorganization policies did prevent further loss of tribal lands.⁵¹

Whatever the gains of Indian Reorganization, it was short-lived. As the United States emerged from the Second World War, social and economic forces again forced a dramatic shift in Indian policy away from reorganization and self-governance toward assimilation of Native American Indians and termination of tribal governments.⁵²

The primary goal of termination policy was to end the trust relationship between the federal government and the tribes, and ultimately subjugate Native American Indians to U.S. federal, state, and local laws.⁵³ As a practical matter, “termination” meant dividing tribally controlled assets, namely land, among individual tribal members and ceasing federal programs that assisted tribes with education, health, welfare, housing, and other social needs.⁵⁴

Another key feature of the termination era was expansion of the role of state law and jurisdiction over Native American Indians. As the federal government withdrew its assistance programs, state and local governments were given broader authority over the individual Native American Indians whose

46. *Id.* § 1.04 & n.8.

47. *Id.* § 1.04 & nn.14–15, 25–31 (providing details on policies that forced educational and cultural assimilation and how those policies failed).

48. *Id.* § 1.04 & nn.33–36 (history of Citizenship Act of 1924).

49. *Id.* § 1.05 & n.8 (discussing the Indian Reorganization Act of 1934).

50. *Id.* § 1.05 & nn.9–10. Criticism of the Indian Reorganization Act includes that it was paternalistic in nature and forced tribes to organize according to norms of the federal government without true respect for tribal sovereignty. *Id.* § 1.05 & nn.13–19.

51. *Id.* § 1.05 & nn.19–20.

52. *Id.* § 1.06 & n.7.

53. *Id.* § 1.06 & n.19.

54. *Id.* § 1.06 & nn.23–24.

tribes had been terminated.⁵⁵ Tribal law, including tribal tax laws, no longer applied to terminated tribes, and state taxing authority was expanded.⁵⁶ With the termination of federal trust obligations and the corresponding expansion of state authority, Native American Indians lost more land and experienced exacerbated poverty.⁵⁷

4. *The Current Era of Self-Determination*

In the 1960s, federal policies with respect to tribes and their members shifted again.⁵⁸ The War on Poverty and new federalism took hold in broader society and set the tone for similar recognition of the obligations of the federal government with respect to tribes.⁵⁹ Thus began the era of tribal self-determination and self-governance, which continues to this day.

The central idea of self-determination policy is that tribes should be “the primary or basic governmental unit of Indian policy.”⁶⁰ For example, the National Congress of American Indians was established to help promote tribes’ ability to develop their “own programs” and “solve their own problems.”⁶¹ In this era, tribes began to self-direct programs that were previously managed by the Bureau of Indian Affairs (BIA), and to create structures for decision-making and program administration at the tribal level.⁶²

Policies of self-determination and self-governance live in the shadow of allotment and termination, specifically in the economic development arena, where land and inheritance issues are complicated by the ownership of land by non-Indians.⁶³ As the Supreme Court’s jurisprudence has borne out, the boundaries of tribal jurisdiction are somewhat circumscribed by land status. For example, the checkerboard patterns of ownership within Indian reservations limit tribal authority over land owned by non-Indians.⁶⁴ To create workable solutions between tribal, state, and local legal authorities, tribes and states have used compacting to “develop[] and maintain mutually beneficial arrangements . . . [which] have created strong mutual respect between Indian and non-Indian professionals.”⁶⁵

55. *Id.* § 1.06 & nn.24–25. For an example of the expansion of state jurisdiction, see Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162; 25 U.S.C. §§ 1321–1326; 28 U.S.C. § 1360); *see also* COHEN, *supra* note 1, § 1.06 n.27.

56. COHEN, *supra* note 1, § 1.06 & nn.24–25.

57. *Id.* § 1.06 & nn.15–32.

58. *Id.* § 1.07 & nn.2–16.

59. *Id.* § 1.07 & n.1.

60. *Id.* § 1.07 & nn.3–4.

61. *Id.* § 1.07 & n.13.

62. *Id.* § 1.07 & nn.15, 30.

63. *Id.* § 1.07 & nn.81–82.

64. *See, e.g.,* *Montana v. United States*, 450 U.S. 544, 563–67 (1981); *Atkinson Trading Co. v. Shirley*, 532 U.S. 654, 659 (2001). The legacy of allotment as it impacts state taxation in Indian Country is discussed *infra* Part I.B.2.c.

65. COHEN, *supra* note 1, § 1.07 & nn.91–93.

B. MULTI-JURISDICTIONAL TAXATION IN INDIAN COUNTRY AND ITS IMPACT ON TRIBAL ECONOMIC DEVELOPMENT

A critical component of self-determination is economic self-sufficiency, which leads tribes to pursue economic development activities.⁶⁶ Taxation plays a critical role in tribes' economic development. This Subpart provides background on the relationship between taxation and economic development in Indian Country, the law regarding the scope of various taxing sovereigns in Indian Country, and the impact of state assertion of taxing authority on tribal economic development.

1. *Relationship Between Taxation and Economic Development in Indian Country*

Taxation serves multiple purposes in society, but the most significant are generating revenue to fund the cost of government and regulating behaviors or economic activities.⁶⁷ To generate governmental revenue, taxes can be imposed on various activities and entities. Common types of taxes include taxes on income, accumulated wealth or property holdings, and consumption activities. The federal government relies heavily on income taxes and wealth taxes on large estates.⁶⁸ States, and derivatively local governments, rely on property tax revenue and, depending on the state, income and/or consumption taxes.⁶⁹

Tribes are in a particularly unique position with respect to income and property taxes. As a practical matter, tribes do not impose income tax, because they lack a sustainable tax base among their members.⁷⁰ As a legal matter, tribes cannot impose ad valorem property taxes upon land within the reservation that is held in trust by the federal government.⁷¹ Accordingly, the remaining options

66. See Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759, 774–84 (2004) (explaining tribal economic development activities).

67. See Barsh, *supra* note 8, at 534–37. In addition to revenue raising for general governmental services and regulatory purposes, taxes can also serve to redistribute wealth and facilitate fiscal stabilization. *Id.* However, while wealth distribution policies may exist in tribal governments, wealth distribution is not usually accomplished through taxation. See Pippa Browde, *Tax Burdens and Tribal Sovereignty: The Prohibition on Lavish and Extravagant Benefits Under the Tribal General Welfare Exclusion*, 20 NEV. L.J. 651, 685–87 (2020) (discussing tax-related issues for per capita distributions of tribal gaming proceeds).

68. The federal government derives most of its revenue from sources related to income, including individual and corporate income taxes and employment-type taxes. WALTER HELLERSTEIN, KIRK J. STARK, JOHN A. SWAIN & JOAN M. YOUNGMAN, *STATE AND LOCAL TAXATION: CASES AND MATERIALS* 4–5 (11th ed. 2020).

69. See *id.* Unlike federal revenue sources (ninety percent of which are derived from income), there are at least eighteen revenue sources for state and local taxes. *Id.* at 5. The three that generate the most revenue for states are income, sales, and property taxes. *Id.* For subnational public finance, property taxes generate seventy-two percent of the revenue for local governments and only 1.7% of state revenue. *Id.* at 6. However, there is “substantial” variation among the fifty states, and the defining characteristic of state taxation is diversity. *Id.* at 5.

70. *Tribal Governance: Taxation*, NAT'L CONG. OF AM. INDIANS, <https://www.ncai.org/policy-issues/tribal-governance/taxation> (last visited Dec. 5, 2022); Fletcher, *supra* note 66, at 771–72, 772 nn.84–85.

71. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 316 (1819).

for tribes are to use consumption taxes and/or severance taxes for the development of natural resources.⁷²

Another unique element of tribal taxation relates to the nature of tribal economies themselves. Some economic development ventures in Indian Country are run by the tribe or tribal entities as opposed to private actors within the tribe.⁷³ If the tribe itself is a market player in the economy, the tribe need not tax itself.⁷⁴ For economic ventures in Indian Country that involve nonmember businesses or partnerships between tribes and nonmember entities, tribal taxation remains an important piece of tribal economic development.⁷⁵ As explained further below, a major challenge for tribal economic development in Indian Country is that states often also assert taxation in Indian Country, creating problems of double, or juridical, taxation.⁷⁶

A useful framework for understanding the relationship between taxation and tribal economic development opportunities in Indian Country is to categorize tribal economic development activities into two distinct types of transactions.⁷⁷ These two distinct categories, set forth below, are helpful to analyze the utility of compacts and to provide a concrete understanding of how tribal economic activities commonly operate. These categories are also useful to understand the scope of the law governing state taxation over transactions within Indian Country.

72. See *infra* Part I.B.2.b; see also Cowan, *supra* note 4, at 103–04 & nn.49–52 (providing examples of how tribes use severance taxes or consumption taxes); Ansson, *supra* note 8, at 512–13 & nn.76–85 (referring to the variety of severance and sales taxes used by the Absentee Shawnee Tribe of Oklahoma).

73. The types of entities used by tribes are beyond the scope of this Article. For an overview of key issues of doing business in Indian Country, including entity structures, see generally Michael P. O’Connell, *Fundamentals of Contracting by and with Indian Tribes*, 3 AM. INDIAN L.J. 159 (2001). One commentator has argued that tribes can avoid the reaches of state taxation in some cases by operating tribal enterprises. See Cowan, *supra* note 4, at 132 & nn.204–09. Critics claim tribally controlled business enterprises represent socialist or communist values, and they have cited market inefficiencies as an argument against them. See generally, e.g., Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757 (2001). But see Fletcher, *supra* note 66, at 775–77 (explaining why the question of whether tribes are socialist is a red herring). Indeed, the economic principles discussed in this Article assume a capitalist economic system. This is not the only model. See STEPHANIE HUNTER MCMAHON, PRINCIPLES OF TAX POLICY 102 (2d ed. 2018) (noting that while the “governing model in much economic theory is an unfettered free market exchange, long assumed to achieve an increase in societal wealth,” it is not universally accepted and has flaws). Tribal economic theory challenges some of the assumptions about capitalist, free-market economies. See Angelique A. EagleWoman, *Tribal Values of Taxation Within the Tribal Economic Theory*, 18 KAN. J.L. & PUB. POL’Y 1, 2 (2008).

74. See Cowan, *supra* note 4, at 119 & n.139.

75. See *id.* at 99 (discussing the consequences of either choosing or foregoing taxation for a tribe); see also Pippa Browde, *From Zero-Sum to Economic Partners: Reframing State Tax Policies in Indian Country in the Post-COVID Economy*, 52 N.M. L. REV. 1, 29 (2022) (referring to the two sides of the economic development “coin”).

76. See *infra* Part I.B.2.

77. To this Author’s knowledge, this particular categorization is novel, though similar delineations have been made in the literature regarding the economic development activities of tribes. See Cowan, *supra* note 4, at 118, 120 (distinguishing between tribally owned ventures versus outside contractors); see also Crepelle, *supra* note 4, at 702–05 (discussing tribal business success such as gaming compared to struggles for private entity development).

The first category is where non-Indian customers purchase goods or services from tribes or tribal enterprises within Indian Country. A state may assert its sales tax on the non-Indian consumer or customer. This scenario is referred to as “tribe as retailer.”

The second category is where the tribe, tribal entities, or tribal members engage in commercial transactions with non-Indian businesses or investors in Indian Country. The state may assert various business taxes, including income or business-operations taxes, on the non-Indian business. This scenario is referred to as “tribe as partner.”⁷⁸

2. *The Law Regarding the Scope of Taxing Sovereigns in Indian Country*

Three sovereigns have, to varying degrees, taxing authority in Indian Country: the tribe itself, the federal government, and state (and derivative local) governments.⁷⁹ Questions about the sovereigns’ taxing authority depend on multiple variables, including the political status of the person or entity subject to taxes and the ownership of the land on which the transaction occurs.⁸⁰

The law regarding federal and tribal taxing authority is briefly described below. State taxing authority in Indian Country is covered in greater depth, because asserted state jurisdiction creates the juridical taxation problems addressed by tax revenue compacts.

78. “Partner” is used in a non-legal sense here—the tribe is not necessarily engaging in a legal partnership bound by principles of agency.

79. This Article attempts to distill principles as simply as possible, though the multiple types of law and policy at issue are anything but simple. *See* Pomp, *supra* note 2, at 904–08 (internal citations omitted) (“Indian taxation drags lawyers into areas outside their normal comfort zone. Practitioners need to master treaties between the federal government and the tribes; state enabling acts; numerous Indian-specific statutes and executive orders that often reflect polar swings in Congressional policy; special Indian canons of construction; the unique patchwork pattern of land ownership on reservations; and concepts like ‘Indian sovereignty’ that serve as ubiquitous, amorphous, and malleable backdrop in many cases.”). For brevity, I only refer to state government authority to tax. For purposes of this Article, state government taxing authority also includes local governments or sub-government authority under the state, such as counties or municipalities. The doctrine governing taxing authority within Indian Country follows the contours and vacillations of Federal Indian policy over the course of history. *See supra* Part I.A.

80. Political status generally refers to whether the individual or entity is deemed Indian under the law. *See, e.g.,* Rachel San Kronowitz, Joanne Lichtman, Steven Paul McSloy & Matthew G. Olsen, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. REV. 507, 514–16 (1987); *see also generally* Johnson v. M’Intosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). It also depends on whether that individual is a member of the governing tribe where a state tax is imposed. For example, if an individual who is American Indian resides or transacts business within the territorial boundaries of a tribe of which they are not a member, an otherwise valid state tax will also apply to the individual. Washington v. Confederated Tribes of the Colville Rsr., 447 U.S. 134, 160–61 (1980). For a critique of this law, *see generally* Scott A. Taylor, *The Unending Onslaught on Tribal Sovereignty: State Income Taxation of Non-Member Indians*, 91 MARQ. L. REV. 917 (2008). For an explanation on the allotment era and the focus on land status, *see supra* Part I.A.

a. *Federal Taxing Authority in Indian Country*

As a general proposition, the federal government has taxing authority within Indian Country.⁸¹ Indian tribes, like state governments and sub-national units of government, are exempt from federal taxes.⁸² Individual Native American Indians, however, are generally subject to federal income tax.⁸³ There are exceptions to that general rule for specific types of income derived from restricted trust allotments and specified treaty or statutory rights, which are exempt from the federal income tax.⁸⁴

b. *Tribal Taxes in Indian Country*

The power to tax is a fundamental attribute of sovereignty retained by tribes, unless Congress specifically divests the tribe of such power.⁸⁵ Tribes are thus free to impose taxes on their members. Tribes are also free to impose taxes over non-Indians transacting business in Indian Country.⁸⁶ For example, tribes may impose hotel occupancy taxes on tribal land within a reservation, sales taxes on sales occurring on reservation land, and severance taxes on companies extracting natural resources from reservation land.⁸⁷ A tribe's authority to tax is

81. See U.S. CONST. art. I, § 8, cl. 1.

82. Rev. Rul. 67-284, 1967-2 C.B. 55. The nature and limits of the federal exemptions are not entirely clear, but exploration of such limits is beyond the scope of this Article.

83. *Squire v. Capoeman*, 351 U.S. 1, 6 (1956). Individual Indians are subject to federal tax on income derived from both tribal and non-tribal sources. *Id.* Federal estate and gift taxes also generally apply to individual Native American Indians. COHEN, *supra* note 1, § 8.02[2][b]. There is some misconception that political status as a member of an Indian tribe provides a blanket exemption from federal tax based on the constitutional language that excluded "Indians not taxed," for purposes of apportioning members of the House of Representatives. U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2; *id.* amend. XXVI, § 1. This language reflected the apportionment census and tax status of tribal members at the time of the drafting of the Constitution. *Id.* In 1924, federal law granted citizenship to all non-citizen Indians born within the territorial boundaries of the United States. Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b)).

84. See Rev. Rul. 67-284, 1967-2 C.B. 55, for an explanation of tax exemptions on income derived from sources on land that are subject to restricted allotment and treaties. One such statutory exemption is § 7873 of the Internal Revenue Code, which exempts individuals and tribal enterprises from federal income taxes derived from tribal fishing rights. 26 U.S.C. § 7873 (2011); see Jensen, *supra* note 1, at 16–17 ("Whatever the inherent, traditional power of tribes within their own country, it is now generally accepted that the federal government has plenary power over the tribes."). The perspective that tribal governments enjoy a diminished or quasi-sovereignty dominates Federal Indian law in judicial opinions and congressional actions. See Jensen, *supra*. A more holistic perspective of sovereignty—specifically that tribes have the "full bundle" of sovereign powers—is another perspective that differs from the constrained Federal Indian law perspective. See EagleWoman, *supra* note 73, at 2.

85. *Colville*, 447 U.S. at 152; see COHEN, *supra* note 1, § 8.04[1].

86. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982). The rule on general regulatory authority over nonmembers doing business within Indian Country comes from the seminal case, *Montana v. United States*, 450 U.S. 544 (1981), decided the year before *Merrion*. "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 455 U.S. at 565. This is known as the first Montana exception to a general rule that tribes lack authority over nonmembers.

87. *Colville*, 447 U.S. at 152 (upholding tribal excise tax on purchase of cigarettes by non-Indians); *Merrion*, 455 U.S. at 143–44 (upholding tribal severance tax imposed on a non-Indian extraction company drilling for oil and gas on reservation land).

generally limited to the geographic confines of tribal land and may not extend to businesses run by non-Indians on land held in fee by non-Indians.⁸⁸

c. State Taxation in Indian Country

As a matter of basic U.S. constitutional law, state governments generally have the authority to tax persons and property within their geographic boundaries.⁸⁹ Indian tribes, though geographically located within a state, are sovereign governments that are not subject to general state laws, including laws imposing state taxation.⁹⁰ The rule that state tax laws do not apply within Indian Country is not absolute—the inquiry turns on who bears the legal incidence of the tax, whether the tax infringes on tribal self-government, and whether federal law preempts the state tax.⁹¹

As an initial matter, if the legal incidence of a state tax imposed in Indian Country falls on a tribe or its members, absent a federal statute permitting such taxation, the state tax will not apply.⁹² Legal incidence exists when a person or party is legally obligated to pay the tax, and it is determined by a formalistic inquiry into the language of the taxing statute.⁹³ In its interpretation of this rule, the Supreme Court has invalidated state fuel taxes assessed on fuel sold by a tribal business operated on a reservation,⁹⁴ state taxes on royalties earned by a

88. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653, 659 (2001) (holding that the Navajo Nation lacked power to impose hotel tax on land owned in fee within the border of the reservation).

89. States retain the powers neither delegated to the federal government nor expressly prohibited by the U.S. Constitution. See U.S. CONST. amend. X. Note that some commentary on federalist structure argues that the law, as it developed, is wrong. For example, Professor Pomp argues that the development of the law giving power to states to impose taxes in Indian Country did not reflect the intent of the Constitution's framers. Pomp, *supra* note 2, at 910 ("The Court has emasculated and denigrated the Indian Commerce Clause, preventing implementation of the Founders' vision.")

90. For a thorough discussion on limits of state power over tribal governments and their members within Indian Country, see COHEN, *supra* note 1, § 6.01[1]–[2]. The application of this rule to matters of state taxation is articulated in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 258 (1992).

91. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995) (legal incidence test); *Williams v. Lee*, 358 U.S. 217 (1959) (infringement on tribal sovereignty test); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (preemption balancing test).

92. *Chickasaw Nation*, 515 U.S. at 458 ("The initial and frequently dispositive question in Indian tax cases . . . is who bears the legal incidence of a tax."). Congressional authorization for state taxation of tribes or tribal members must be express and unmistakably clear. *Bryan v. Itasca Cnty.*, 426 U.S. 373, 392 (1976). Cases in which federal statutes permit state taxation in Indian Country are beyond the scope of this Article.

93. Legal incidence is often referred to as "statutory incidence." Don Fullerton & Gilbert E. Metcalf, *Tax Incidence 1* (Nat'l Bureau of Econ. Rsch., Working Paper No. 8829, 2002). For a brief explanation of the distinctions between the party who is legally obligated to pay a tax and the party or parties who bear the economic cost or burden of the tax, see MCMAHON, *supra* note 73, at 120. How the economic realities of a tax play out is a complicated question. See JOEL SLEMRUD & JON BAKIJA, *TAXING OURSELVES: A CITIZEN'S GUIDE TO THE DEBATE OVER TAXES* 111 (5th ed. 2017). "For any given tax, the true incidence is difficult to determine precisely, and for some taxes there is still substantial disagreement among economists about what the truth is." *Id.* at 113. The emphasis on legal incidence has been subject to critique. See, e.g., Pomp, *supra* note 2, at 1195 (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)) (criticizing the Court's formalistic legal incidence rule as having "no relationship to economic realities" and presenting "a trap for the unwary draftsman").

94. *Chickasaw Nation*, 515 U.S. at 453.

tribal member for leasing property on a reservation,⁹⁵ state cigarette and motor vehicle taxes imposed on a tribal member,⁹⁶ and state income taxes imposed on a tribal member's income that was sourced entirely on the reservation where the tribal member lived and worked.⁹⁷ However, a state tax of which the legal incidence falls on a tribe or individual Native American Indian may be upheld if the taxed activity did not occur within Indian Country.⁹⁸

If the legal incidence of a state tax falls on non-Indians or nonmember Indians within Indian Country, then the question of the state tax's validity is more vexing. Generally, the rule is that states may impose a nondiscriminatory tax unless the tax infringes on tribal self-government⁹⁹ or Congress has preempted the tax.¹⁰⁰ The infringement test, which was first articulated by the Supreme Court in 1959 and derives from notions of tribal sovereignty, has rarely been applied to resolve the issue of validity.¹⁰¹ The Court has noted the trend away from infringement analysis and toward preemption analysis in determining a tax's validity.¹⁰²

Federal preemption of state taxation is not limited to cases of express congressional preemption.¹⁰³ If a state tax violates federal law, as determined by "a particularized inquiry into the nature of the state, federal, and tribal interests at stake," then the tax is preempted.¹⁰⁴ The "particularized inquiry" analysis is like a balancing test that weighs the extent of federal regulation and control of the activity the state seeks to tax against the regulatory and revenue-raising interests of states and tribes and the provision of state or tribal services.¹⁰⁵ Preemption jurisprudence regarding the validity of state taxes imposed in Indian Country on non-Indians yields unpredictable results.¹⁰⁶

Courts have applied the preemption analysis in a variety of contexts. It has played out slightly differently in cases where the tribe is a retailer as compared to when the tribe is acting as a partner.

95. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 768 (1985).

96. *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 469, 480–81 (1976).

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

98. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 156 (1973).

99. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

100. *Moe*, 425 U.S. at 483.

101. See generally *Williams*, 358 U.S. 217 (setting forth the infringement test).

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

103. *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 176–77 (1989).

104. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). Though the law makes no explicit taxonomical distinctions between the two types of scenarios posited here, the tests for preemption are slightly different for state taxation when tribes are acting as retailers versus when tribes are acting as partners. See *id.* at 141–43, 150–53.

105. *Id.* at 150–51.

106. The law has been more thoroughly explained elsewhere in the literature. See, e.g., Jensen, *supra* note 1, at 55–84 (discussing preemption and state power to tax within Indian Country); Cowan, *supra* note 4, at 143–49 (addressing preemption and accompanying problems). This Article is not intended to serve as a critique of the law, but rather as a basis for understanding why compacting is favorable for states and tribes.

In the tribe-as-retailer scenario, tribal revenue-raising interests are most likely to outweigh state interests when the revenue from the tax is “derived from value generated on the reservation by activities involving the [tribes,] and when the taxpayer is the recipient of tribal services.”¹⁰⁷ In *Washington v. Confederated Tribes of the Colville Indian Reservation*, the Supreme Court upheld state excise taxes imposed on sales of cigarettes by tribal retailers to non-Indians on a reservation.¹⁰⁸ In balancing the state, federal, and tribal interests, the Court found that the tribe had no special claim to tax revenue generated from the sales of cigarettes, because the value of the cigarettes was not generated by the tribe or created on the reservation.¹⁰⁹

Levying state taxes over tribes and tribal enterprises engaged in retailing is a complicated matter. Given such complexity, the Supreme Court has said that a state can require a tribe to maintain detailed records to prove which sales are exempt from state taxes.¹¹⁰ How a state can enforce the collecting and recordkeeping requirements may be limited by the doctrine of tribal sovereign immunity.¹¹¹

In the tribe-as-partner scenario, the Court has applied the preemption balancing test, articulated in *White Mountain Apache Tribe v. Bracker*,¹¹² in ways that have arrived at seemingly absurd results. In *White Mountain Apache*, the Court invalidated state taxes imposed on a non-Indian logging company engaged in business on tribal land, reasoning that state taxation would undermine the pervasive federal regulatory scheme over logging in Indian Country.¹¹³ The Court concluded that, because the federal government and tribe had constructed, maintained, and policed the roads used by the logging company, the state’s interest in logging or maintaining the roads was minimal to nonexistent.¹¹⁴

Nine years later, in *Cotton Petroleum Corp. v. New Mexico*, the Court considered a similar set of facts but reached the opposite conclusion regarding the state’s ability to tax a non-Indian business within Indian Country.¹¹⁵ In *Cotton Petroleum*, the Court upheld state severance taxes on the production of

107. *Washington v. Confederated Tribes of the Colville Rsrv.*, 447 U.S. 134, 156–57 (1980). *Cf.* *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir. 1994). In *Cabazon*, the tribe constructed and operated betting facilities, and the court distinguished the tribe’s venture from those that were “merely serving as a conduit for the products of others.” *Id.* at 435.

108. 447 U.S. at 154–57. *Colville* is also discussed above, as it stands for the proposition that tribes can impose tribal taxes on non-Indians in Indian Country. *Id.* at 152–54.

109. *Id.* at 156–57. The outcome of this case led the Squaxin Island Tribe to market its own cigarette brand that was manufactured on tribal lands, immunizing the tribal retail sales from state taxation entirely. *See Fletcher*, *supra* note 66, at 789 & n.197.

110. *Colville*, 447 U.S. at 160.

111. *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991).

112. 448 U.S. 136 (1991).

113. *Id.* at 149.

114. *Id.* at 148–50.

115. 490 U.S. 163 (1989).

oil and gas by non-Indian lessees within Indian Country.¹¹⁶ Like the federally regulated logging industry in *White Mountain Apache*, the extraction of oil and gas in Indian Country was subject to pervasive federal regulation, under the Mineral Leasing Act of 1938.¹¹⁷ The non-Indian extraction company argued that the state's tax was inconsistent with the federal policies of tribal self-determination.¹¹⁸ Minimizing the importance of tribal sovereignty, the Court upheld the state tax, relying on the finding that the state provided “substantial services” to both the tribe and the non-Indian taxpayer,¹¹⁹ and determining that the impact of the tax on tribal or federal interests was “too indirect and too insubstantial.”¹²⁰

It is easier to predict whether courts will uphold a state tax imposed on non-Indian consumers purchasing from tribal retailers than whether courts will uphold a state tax imposed on transactions in which the tribe is acting as partner. When it comes to tribes acting as partners with non-Indian businesses engaging in economic activity in Indian Country, the validity of a state tax can be highly uncertain.

3. *Impacts of Juridical Taxation on Tribal Economic Development Opportunities*

The scope of actual or potential state taxation in Indian Country impacts economic development choices and opportunities for tribal governments. Legal uncertainty surrounds both types of transactions in Indian Country—tribe as retailer and tribe as partner—forcing tribes to make choices about potential litigation or cessions of taxing authority. The impact of state taxation on tribes' economic development is discussed below in relation to both types of transactions.

First, with respect to economic development opportunities for tribes acting as retailers, the law does not allow a tribe to “market a tax exemption” from state taxation as a means of attracting consumers.¹²¹ Absent unique value created or

116. *Id.* at 175, 186.

117. *Id.* at 167; 25 U.S.C. § 396a *et seq.*

118. *Cotton Petrol.*, 490 U.S. at 176–77.

119. *Id.* at 185.

120. *Id.* at 187. The result in *Cotton Petroleum* was also surprising because the Supreme Court appeared to change course with respect to whether the Mineral Leasing Act of 1938 permitted state taxation. *Id.* at 182–83, 183 n.14. In a footnote, the Court denied that the result was inconsistent from past cases. *Id.* at 183 n.14. However, in a prior case, *Montana v. Blackfeet Tribe of Indians*, the Court interpreted the Mineral Leasing Act of 1938 and its predecessor act to hold that because the 1938 law did not expressly permit state taxation, the Court would not infer state taxing authority. 471 U.S. 759, 766–67 (1985).

121. *Salt River Pima-Maricopa Indian Cmty. v. Arizona*, 50 F.3d 734, 737 (9th Cir. 1995) (“When state taxes are imposed on the sale of non-Indian products to non-Indians, [such] as . . . in the so-called ‘smoke shop’ cases, the preemption balance tips toward state interests.”); *see also* *Washington v. Confederated Tribes of the Colville Rsrsv.*, 447 U.S. 134, 155 (1980) (“We do not believe that principles of Federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.”). For a critique of

added by the tribe to the goods sold, the same retail transaction involving a non-Indian customer may be subject to a state retail sales or excise tax.¹²² As a legal matter, the tribe may still assert its own retail or excise taxes.¹²³ But as an economic matter, non-Indian consumers will not choose to bear the economic cost of both the tribe's and state's tax, and will instead purchase goods or services off-reservation.¹²⁴

Second, in scenarios where a non-Indian business is engaged in transactions with the tribe as a partner, actual or potential state taxation on the non-Indian business can chill outside investment.¹²⁵ The complexity and inconsistent results in the case law creates an uncertain landscape for businesses interested in engaging in ventures in Indian Country but concerned about tax consequences.

Where a state has the ability to tax a transaction in Indian Country, outside investors and businesses may choose not to engage with tribes as partners, given that they can be taxed by both the state and the tribal entity.¹²⁶ As a practical matter, a tribe must then decide between taxing the business entity to raise revenue and encourage economic development or foregoing the tax in the hopes that a lower tax burden will encourage investment from outside businesses.

Accordingly, juridical taxation in Indian Country creates results inconsistent with Federal Indian policy intended to foster a tribe's ability to promote self-government through tribal self-determination.¹²⁷

C. COMPACTS AS A SOLUTION TO THE DOUBLE TAX PROBLEM

Given the state of the law regarding state taxation in Indian Country, states and tribes have turned to other mechanisms to resolve disputes over tax consequences.¹²⁸ One collaborative solution is for tribes and states to enter into

Colville in denying tribes primacy in imposing consumption taxes on sales to non-Indians, see Fletcher, *supra* note 66, 787–89, 787 n.188 (discrediting state arguments in favor of “[l]eveling the playing field” as a pretext for states competing with tribal sales tax revenue).

122. *Colville*, 447 U.S. at 155 (concluding that the Tribe did not create value in cigarettes marketed). Courts have repeatedly upheld state taxes over tribal sales of cigarettes on the grounds that the cigarettes were not created by the tribe or from reservation resources. See, e.g., *Dep't of Tax'n & Fin. v. Milhelm Attea & Bros.*, 512 U.S. 61, 61, 76 (1994); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 483 (1976). The test articulated in *Colville* has not been developed in further case law, and at least one commentator has noted that the test “probably cannot bear the weight it is being asked to carry.” Pomp, *supra* note 2, at 1219.

123. *Colville*, 447 U.S. at 152–53.

124. *Id.* at 154 (noting that tribes will be at a competitive disadvantage because combined tribal and state taxes on sales of cigarettes to non-Indians will be higher).

125. See Crepelle, *supra* note 4, at 725 (“State taxes absolutely kill private investment in Indian Country.”).

126. One tribal leader referred to the culmination of factors, including the potential for double tax, lack of infrastructure, and uncertain tribal commercial law, as the “Indian differential” that diminishes a tribe's ability to attract investment. Cowan, *supra* note 4, at 95 & n.13.

127. *Id.* at 99 (“In light of the double tax problem, these seemingly coherent and compatible goals can be at odds with one another — to the point of looking mutually exclusive.”).

128. There is a significant body of literature calling courts to resolve the double tax problem. See Pomp, *supra* note 2, at 1220; Taylor, *supra* note 8, at 890. Alternatively, Congress could provide a federal solution. See

intergovernmental agreements, referred to as compacts, which resolve the issues that arise from the state asserting taxing authority in Indian Country. This Subpart first provides some necessary general background on what tribal-state compacts are and how they operate as both a sacrifice and expression of sovereignty. It then provides specific examples of existing compacts between states and tribes in both categories of transactions, tribe as retailer and tribe as partner, to detail how tribal-state compacts operate.

1. *General Background on Tribal-State Compacts*

Compacts are “working agreements between tribes and states that resolve jurisdictional or substantive disputes and recognize each entity’s sovereignty.”¹²⁹ Compacts are like super-contracts. While contracts and compacts both address specific problems or transactions, contracts generally do not address jurisdictional legal issues or entitlements between sovereigns.¹³⁰ Furthermore, compacts are viewed as more binding than contracts.¹³¹ The use of the term compact as opposed to a mere contract also represents that the transacting parties are sovereign entities, engaging in intergovernmental agreements.¹³²

In all areas of the law, compacting is both an expression and concession of sovereignty. It is an expression of sovereignty, because the compacting sovereign has the power to enter the agreement in the first place. But it is also a concession of sovereignty, because the compacting sovereign is giving up control.

State authority to engage in compacting with tribes varies by state, but most states have some enabling legislation that specifically allows state actors to negotiate and compact with tribes.¹³³ These statutes come in various forms, including statements of policy “encouraging cooperation,” such as in Montana

Cowan, *supra* note 4, at 97. States could step in and provide a solution, as well. See Browde, *supra* note 75, at 25–30.

129. *Intergovernmental Compacts*, *supra* note 15, at 922.

130. *Id.* at 924.

131. *Id.*

132. *See id.* (“Compacts differ from ordinary contracts because they may be more enforceable, and because contracts, unlike compacts, do not normally resolve issues of legal entitlement or jurisdiction between sovereign entities, but merely provide closure for a specific problem. Compacts are more closely related to treaties.”).

133. *See Getches*, *supra* note 15, at 147 (“Absent some particular aspect of state law that would make such legislation necessary, states appear to have the power to negotiate such agreements whether or not they are specifically authorized by state legislation.”). Tribal-state agreements generally do not need to be sanctioned by the federal government. *Id.* at 145 (“Neither federal permission nor federal approval is generally required for interjurisdictional agreements.”). The federal government must approve compacts that involve more than one state. *See id.*; U.S. CONST. art. 1, § 10, cl. 3. Because of the trust relationship between the federal government and Indian Nations, any agreement that would involve “attempts to alienate Indian property or other Indian rights” would require congressional approval unless otherwise delegated to the Secretary of the Interior. *Getches*, *supra*, at 145.

and Nebraska.¹³⁴ Other such laws grant specific authority to negotiate certain types of taxes, such as cigarette or other excise taxes.¹³⁵ Still other statutes approve and incorporate tax compacts with tribes as a matter of state statutory law.¹³⁶

Just as there is a variety of enabling legislation, so also do the types of compacts between tribes and states encompass a variety of legal jurisdictional issues. Forty years ago, the Commission on State-Tribal Relations surveyed compacts between tribes and states in five substantive areas of law: “law enforcement, tax collection, natural resources, social services, and general government activities.”¹³⁷ Compacts have been used in many legal contexts to address conflicting state and tribal laws, including “wildlife management, environmental protection, education, social services, taxation, and law enforcement.”¹³⁸

Compacts largely exist to resolve conflicts of law.¹³⁹ A unique aspect of tribal-state tax revenue compacts is that they resolve an economic, not legal, problem.¹⁴⁰ Where both the tribe and the state assert authority to tax the same

134. See State-Tribal Cooperative Agreements Act, MONT. CODE ANN. § 18-11-101 (West 2022); State-Tribal Cooperative Agreements Act, NEB. REV. STAT. §§ 13-1501 to -1509 (2022); see also ARIZ. REV. STAT. ANN. § 42-3308 (2014); FLA. STAT. § 285.710(8)(a) (2022); IOWA CODE ANN. § 421.47 (West 2011); State Tribal Relations Act, IDAHO CODE ANN. §§ 67-4001 to -4003 (West 2012); MICH. COMP. LAWS ANN. § 205.30c (West 2013); MINN. STAT. § 270C.19 (2021); N.M. STAT. ANN. § 9-11-12.1 (West 2021) (governing New Mexico tribal cooperative agreements generally); N.M. STAT. ANN. § 9-11-12.2 (West 2022) (authorizing New Mexico cooperative agreements with the Navajo Nation specifically); N.Y. EXEC. L. § 12 (Consol. 2022); OKLA. STAT. tit. 68, § 500.63 (2022); OR. REV. STAT. § 323.401 (2021) (governing refund agreements between Oregon and tribal governments); S.D. CODIFIED LAWS §§ 10-12A-1 to -9 (West 2018); WASH. REV. CODE § 43.06.450 (2019) (addressing Washington state cigarette tax compacts); WASH. REV. CODE § 43.06.490 (2022) (governing Washington marijuana tax agreements); WASH. REV. CODE § 82.38.310 (2022) (governing Washington fuel tax agreements); WIS. STAT. § 139.325 (2022) (Wisconsin agreements with Indian tribes); WIS. STAT. § 139.323 (2022) (regarding refunds of Wisconsin taxes to Indian tribes).

135. See MINN. STAT. § 270C.19 (2022) (authorizing the state of Minnesota to enter tax refund agreements on sales, use, and excise taxes); ARIZ. REV. STAT. ANN. § 42-3308 (2018) (authorizing the state of Arizona to collect and administer tribal taxes after compacting with tribes to coordinate tobacco tax administration).

136. See KAN. STAT. ANN. § 79-2986 (2022) (approving a tobacco sales tax compact between Kansas and the Kickapoo Tribe of Kansas); COLO. REV. STAT. § 24-61-102 (2018) (approving and incorporating into state law a tax compact between Colorado and the Southern Ute Indian Tribe).

137. COMMISSION ON STATE-TRIBAL RELATIONS, *supra* note 15, at 5; see *id.* at 1–2 (explaining that the Commission on State-Tribal Relations was created in response to a rising sense of antagonism and suspicion between states and tribes regarding jurisdictional questions in Indian Country).

138. Getches, *supra* note 15, at 150–51. Professor Getches used the examples of compacts to argue that tribes were negotiating sovereignty, and that such examples could be utilized as models to promote sovereignty among first nations in Canada. *Id.*

139. Compacts between tribes and states in non-tax contexts, such as environmental law, often involve a conflict of law problem. See *id.* at 121–22. For example, a tribe may be more stringent on environmental regulation of pollutants than a state, or vice versa. In that example, both the state’s and tribe’s laws cannot apply, because they are inconsistent. See *id.* at 151–60 (providing specific examples of compacts that resolve hunting and fishing licensing conflicts, zoning and land-use regulation, law enforcement, and water law disputes).

140. This is not a claim of tax exceptionalism. The law over state regulatory authority in Indian Country creates a different conflict problem with respect to taxation as compared to other state civil regulatory authority.

transaction, both tribal and state taxation can apply, as a legal matter.¹⁴¹ Because imposing both state and tribal taxation increases the total tax cost of the transaction, as an economic and practical matter, the transacting parties will simply not engage in the transaction in Indian Country.¹⁴² Compacts between tribes and states as to taxing authority are thus borne of practical, not legal, necessity.¹⁴³

2. Key Components of Tax Revenue Compacts

Many tribal-state tax revenue compacts share common elements. For example, many of the non-substantive provisions of tax compacts are similar to other intergovernmental agreements not specific to tax. All tax revenue compacts also contain substantive provisions that resolve or address juridical taxation, tax enforcement, or both between sovereigns. Examples of provisions are provided below; however, a caveat is warranted here. Despite some basic similarities, there is still tremendous variation among tax revenue compacts, because they are negotiated between states and individual tribes.¹⁴⁴

a. Common Non-Substantive Provisions in Tax Revenue Compacts

Tax revenue compacts contain several general (non-substantive) provisions that are similar to many intergovernmental agreements between tribes and states. Common non-substantive provisions identify the parties, refer to the sovereignty of the tribe and the law granting the state authority to enter the compact, define terms, refer to existing substantive state or tribal tax laws or ordinances, and

141. This is different than, for example, a water quality regulation that differs between the state and tribal regulation, where both laws cannot apply. *See supra* Part I.B.2.

142. This is the double bind that forces a tribe to choose between tax revenue and the economic development activities themselves. *See supra* Part I.B.3 (discussing the double bind of juridical taxation); *see also* Cowan, *supra* note 4, at 118–23 (exploring double taxation as it affects tribes that run commercial ventures and tribes that develop natural resources).

143. Professor Pomp notes that courts have been relatively indifferent to the problems of double taxation. *See* Pomp, *supra* note 8, at 1220. Professor Pomp also notes that the issue has not been briefed with strong evidentiary support, and that perhaps courts would respond if there were more factual development on this issue. *Id.*

144. This caveat has been repeated in this Article and is an important and humbling aspect of Federal Indian law. *See generally* Mark J. Cowan, *State-Tribal Tax Compacts: Stories Told and Untold*, CTR. FOR INDIAN COUNTRY DEV.: POL'Y DISCUSSION PAPER SERIES (Fed. Rsrv. Bank of Minneapolis, Minneapolis, Minn.), Sept. 2021, at 1. Indeed, the only thread of consistency is that the unique nature of each individual tribe and, to some degree, the unique attributes of various states and the types of taxes imposed, lead to varied and diverse compacts. *Id.* at 11–13. The number of existing compacts itself is not known. Many sources state that nationwide, more than 200 tribes have entered into compacts with eighteen states. *Tax Fairness and Tax Base Protection: Hearings on H.R. 1168 Before the H. Comm. on Resources*, 105th Cong. (1998) (testimony of W. Ron Allen, President, National Congress of American Indians). As Professor Cowan notes, this data is twenty-five years old and has not been updated. *See* Cowan, *supra*, at 13 n.29.

provide for administrative issues such as enforcement, termination, and dispute resolution.¹⁴⁵

The parties to the agreement are usually a state, local government, or branch of the state government and the compacting tribal nation or branch of tribal government.¹⁴⁶ Compacts provide the authority the state has to enter the agreement.¹⁴⁷ They usually articulate the goal or purpose of the intergovernmental agreement, which is often to resolve the potential consequences of juridical taxation.¹⁴⁸ Compacts also expressly state which particular tax or taxes are subject to the agreement.¹⁴⁹ In specifying which taxes are subject to the agreement, many compacts address the fact that the terms only apply to the narrow slice of transactions for which states have actual or potential taxing authority, such as when the legal incidence of the tax falls on non-Indian

145. There are thorough descriptions of the common provisions in compacts and the functions they serve. See Cowan, *supra* note 144, at 13. Professor Cowan explores the fact that not all compacts acknowledge the sovereignty of tribes. *Id.* at 24. He argues that the sovereignty of tribes should be “constantly acknowledged,” given the history of fluctuating policies by the federal government regarding tribal sovereignty. *Id.* As discussed later in this Article, the compact itself is both an expression of tribal sovereignty and a cession of sovereignty to the extent by which the terms and practical realities require a tribe to cede taxing authority and revenue streams. See *infra* Part II.

146. See, e.g., Fort Peck Tribes and State of Montana Oil and Natural Gas Production Tax Agreement, § I, Mar. 25, 2008, <https://mtrevenue.gov/wp-content/uploads/2017/12/Fort-Peck-Tribes-Montana-Oil-and-Natural-Gas-Production-Tax-Agreement-2008-03-25.pdf> [hereinafter Fort Peck Tribes Agreement] (identifying the parties as the state of Montana and the Assiniboine and Sioux Tribes of the Fort Peck Reservation); Marijuana Compact Between the Suquamish Tribe and the State of Washington, § II, Sept. 15, 2015, <https://lcb.wa.gov/publications/Cannabis/Compact-9-14-15.pdf> [hereinafter Suquamish Tribe Agreement] (identifying the parties as the Suquamish Tribe and recognizing the authority of the Washington State Liquor and Cannabis Board to negotiate the terms of the agreement); Cooperative Agreement Between New Mexico Taxation and Revenue Department and Santa Fe Indian School, Inc., Recitals, Sept. 29, 2010, <https://klvg4oyd4j.execute-api.us-west-2.amazonaws.com/prod/PublicFiles/34821a9573ca43e7b06dfad20f5183fd/37b08e9d-3e50-4da9-87a5-85628a890450/SF%20Indian%20School,%20Inc.%20&%20NM%20Taxation%20and%20Revenue%20Department.pdf> [hereinafter Santa Fe Indian School Agreement] (identifying the compacting parties as the New Mexico Department of Revenue on behalf of the state and the Santa Fe Indian School, Inc., a nonprofit designated to act on behalf of the Nineteen Indian Pueblos).

147. See *supra* Part I.C.1.

148. See Cowan, *supra* note 144, at 13–14; see also Fort Peck Tribes Agreement, *supra* note 146, § II (“The purposes of this Agreement are (1) to avoid dual taxation of new oil and gas production . . . ; (2) to ensure that the same level of taxation is imposed on new production of oil and natural gas both within and outside the boundaries of the Reservation; and (3) to avoid legal controversy regarding the taxation of new oil and natural gas production . . .”).

149. Professor Cowan uses ten tax agreements to show the variety of taxes for which compacts are negotiated. See Cowan, *supra* note 144, at 15–23 (outlining compacts over excise taxes (fuel, tobacco, marijuana), severance taxes (oil and gas), and multi-tax (sales, property)). Compacts address a variety of taxes, and it is helpful to distinguish between the sales or consumption-type taxes that apply in transactions where the tribe is a retailer, and the severance or business-profits type of taxes that apply in transactions where the tribe is a partner. This distinction is important in fleshing out the incentives of the compacting parties. See *infra* Part II.A.

parties.¹⁵⁰ Some compacts only address administrative issues, such as collection and enforcement between sovereigns.¹⁵¹

The definition of terms usually specifies the geographic location over which the tribe and state both assert taxing authority.¹⁵² Though not often a disputed matter, the territorial boundaries and jurisdiction of a tribe can be a contentious issue, a reminder of the legacy of the policies of allotment and termination.¹⁵³ Tax compacts also usually provide explicit recitals regarding the compacting parties' sovereign immunity.¹⁵⁴

b. Common Substantive Provisions in Tax Revenue Compacts

The substantive issues in tribal-state tax compacts depend on whether the agreement addresses juridical taxation or tax enforcement and administration issues, though many compacts address both.¹⁵⁵

A key feature of compacts that addresses juridical taxation is the inclusion of terms that specify a single applicable rate of taxation for transactions in Indian Country. "The applicable rate" clause or terms can eliminate juridical tax in a variety of ways. For example, if the agreement between a tribe and state is that a single layer of taxation at an agreed rate should apply to a given transaction, there are three ways that can be achieved. First, a compact can specify the state

150. See *supra* Part I.B.

151. See Cooperative Agreement Between the Jicarilla Apache Revenue and Taxation Department and the Taxation and Revenue Department of the State of New Mexico Regarding the Gross Receipts Tax, § 1, Dec. 28, 2004, <https://klyg4oyd4j.execute-api.us-west-2.amazonaws.com/prod/PublicFiles/34821a9573ca43e7b06dfad20f5183fd/b86127cf-f28f-4102-80f2-b29cf749e37d/Jicarilla%20Apache%20Nation%20and%20NM%20Taxation%20and%20Revenue%20Department.pdf> ("The [purpose of] . . . this Agreement . . . [is] to provide for the exchange of information and the reciprocal, joint or common enforcement, administration, collection, remittance and audit of gross receipts taxes of the party's jurisdictions.").

152. See Fort Peck Tribes Agreement, *supra* note 146, § II(B) ("This Agreement is limited to the taxation of new oil and natural gas production from producers on the Reservation over whom both the State and the Tribes each assert taxation authority, recognized as follows: (1) nonmember producers on trust land; (2) nonmember producers on tribally owned fee lands; (3) nonmember producers on member trust allotments; (4) nonmember producers on member-owned fee land; (5) nonmember producers on fee lands of nonmembers, if the mineral estate is owned by the Tribes or by its members; and (6) nonmember producers outside the exterior boundaries.").

153. See 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, 19 (2004) (noting the unique problems in Michigan that stem from the fact that "most Michigan Tribes' reservation boundaries are either unknown or unrecognized by the State"). In compacts between the state of Michigan and the tribal nations located within it, the definition and delineation of Indian Country becomes a substantive issue for debate. *Id.* at 44. The compact as to the reservation boundaries in and of itself has prevented litigation. *Id.*

154. See Fort Peck Tribes Agreement, *supra* note 146, § XIV (noting state immunity from actions in tribal court and granting the Tribe a limited waiver of sovereign immunity); *id.* § XXI(B) (stating that no rights, arguments, or defenses are waived unless expressly stated).

155. To distinguish between the provisions as "substantive" and "non-substantive" is a bit misleading, especially for those used to what is traditionally substantive tax law versus procedural tax law. For purposes of this Article, substantive tax law refers to the tax itself, such as which jurisdiction's tax applies to a transaction in Indian Country and at what rate. Procedural tax law refers to questions of enforcement or tax administration, such as which authority has administrative obligations of reporting, collecting, and remitting taxes. Furthermore, the problem of juridical taxation has at its core a procedural dimension, since multi-jurisdictional taxation is about how a sovereign can impose its taxing authority on inter-sovereign transactions.

rate of taxation over a transaction, allowing the state tax to override tribal taxation of the transaction.¹⁵⁶ Second, a compact can specify the opposite—that the tribal tax be imposed at the same rate as the state, and that the state exempt the transaction from taxation.¹⁵⁷ Third, a compact can create a combination of lower state and tribal taxes to equal the agreed amount.¹⁵⁸ That amount is usually the state rate that would generally apply outside of Indian Country.

Some compacts specify a minimum rate as a floor but do not cap a maximum rate, allowing a tribe to increase the rate of tax imposed within its jurisdiction if desired.¹⁵⁹ If a tribe does impose a rate greater than the state rate, the juridical tax is eliminated, but the tribe creates a situation where the higher tax rate discourages consumption. For example, if a tribe imposes a higher sales tax than that outside of Indian Country, consumers will likely shop outside of Indian Country.

In addition to addressing juridical taxation, compacts also allocate revenue in the “sharing” portion of the agreement. Revenue allocation can be achieved through the following mechanisms. First, compacts can be all-or-nothing propositions, where either the state or the tribe is entitled to all the tax revenue generated by the transactions occurring in Indian Country.¹⁶⁰ According to some compacts, the parties may share the revenue based on a percentage¹⁶¹ or a “per

156. See Tax Agreement Between the Little River Band of Ottawa Indians and the State of Michigan, § III(B)–(C), Dec. 30, 2002, https://www.michigan.gov/documents/LTRB_Agreement_5819-1_with_appendix_88260_7.pdf (agreeing that the state rate applies unless the Tribe enacts a general sales tax rate at least equal to the state rate, at which point the tribal tax applies and the state exempts the transactions).

157. See DOUGLAS B.L. ENDRESON, RESOLVING TRIBAL-STATE TAX CONFLICTS 15 (1991) (discussing the Tax Agreement Between the State of Louisiana and the Chitimacha Tribe, which exempts state sales and excise taxes on tobacco sold on the Chitimacha Reservation from state tobacco sales in exchange for the Tribe agreeing to purchase from Louisiana wholesalers and impose tribal taxes at the same rate as the state).

158. See generally Intergovernmental Agreement Between State Tax Commission of Utah and Office of the Navajo Tax Commission, at 3, Oct. 16, 2000, <https://sct.narf.org/documents/richardsvpbp/TRIBAL-STATE%20FUEL%20TAX%20AGREEMENTS/NAVAJO%20NATION-UTAH%20AGREEMENT.pdf> (agreeing to impose a combined fuel tax of \$0.245 per gallon on fuel sales to non-Indians and nonmembers within the Navajo Nation, with \$0.18 attributable to Navajo Nation tribal tax and \$0.065 attributable to Utah tax).

159. See ENDRESON, *supra* note 157, at 16 (discussing how the State of Nevada and Reno Sparks Tribe Tax Agreement provides that the Tribe will impose excise tax on the sale of cigarettes and sales tax on tangible personal property at least equal to, but no greater than, state tax rates, and that the Tribe will not price cigarettes less than the state wholesale rate to create a competitive price advantage).

160. There are many examples of compacts where the tribe retains all revenue or is entitled to all revenue generated by on-reservation transactions. See, e.g., Suquamish Tribe Agreement, *supra* note 146, § V(F); Compact Relating to Cigarette and Tobacco Sales and Taxation, Iowa Tribe of Kan. & Neb.-State of Kan., art. II, Feb. 22, 2016, <https://ag.ks.gov/docs/default-source/documents/2016-2-22-compact---iowa-tribe-signed.pdf?sfvrsn=2> [hereinafter Iowa Tribe Compact] (allocating all excise tax revenue from the sale of tobacco by the Tribe to non-Indians to the Tribe, and the Tribe agreeing to stamp requirements for tobacco); Cannabis Agreement Between Elko Band Colony of the Te-Moak Tribe of Western Shoshone Indians of Nevada and the State of Nevada, § V(E), Jan. 23, 2020, <https://ag.ks.gov/docs/default-source/documents/2016-2-22-compact---iowa-tribe-signed.pdf?sfvrsn=2> (prohibiting the collection of state tax relating to cannabis products sold or purchased by the Tribe, provided that the tax rate is at least equal to the state tax).

161. See Fort Peck Tribes Agreement, *supra* note 146, § VIII (allocating fifty percent of the tax revenues covered by the Agreement to the Tribe); see also Agreement for the Collection and Dissemination of Motor

capita” allocation based on population.¹⁶² Other compacts contain a more complex formula.¹⁶³ For example, Michigan and seven of the twelve federally recognized Indian tribes located within the state negotiated tax agreements that are substantially the same.¹⁶⁴ The terms in those compacts regarding sales taxes allocate sales tax revenues between the compacting tribe and state by percentages.¹⁶⁵ The size of these percentages depends on the annual gross receipts of sales, and whether the tribe itself has its own sales tax or is just enforcing the state tax.¹⁶⁶ If the tribe has its own sales tax with a rate at least as high as the state sales tax, the tribe is entitled to retain two-thirds of the revenue on the first \$5 million of annual gross receipts and remits one-third of the revenue to the state.¹⁶⁷ The tribe and state agree to split revenue in excess of the \$5 million threshold equally.¹⁶⁸ If the tribe does not have its own sales tax, the tribe and state agree to the same sharing terms; however, the tribe must remit the collected tax on applicable transactions, and the state will pay the tribe.¹⁶⁹ Some

Fuels Taxes Between the State of Nebraska and the Winnebago Tribe of Nebraska, Part IV.9, Jan. 24, 2002, <https://revenue.nebraska.gov/sites/revenue.nebraska.gov/files/doc/motor-fuels/legal/Agreement%20with%20Winnebago%20Tribe%20Jan%202002.pdf> [hereinafter Winnebago Tribe Agreement] (allocating to the state twenty-five percent of the revenue from a tribal excise tax on fuel sales to non-Indians, which are exempt from state tax).

162. Some allocations are based on the population of tribal nations, which in turn are based on the number of enrolled members who reside within the tribal reservation boundaries. *See* Crow Tribe-Montana Tobacco Tax Agreement, Crow Tribe-State of Mont. Dep’t of Revenue, § 5(a), May 13, 2005, <https://mtrevenue.gov/?mdocs-file=57501> [hereinafter Crow Tribe Agreement] (“For each calendar quarter, the Tribe shall receive an amount of tobacco taxes pre-collected for tobacco sales on the Reservation, which approximates the sales to enrolled Crow tribal members living on the Reservation. The amount of tobacco taxes that the Tribe receives shall be determined by multiplying 150 percent of the Montana per capita tobacco tax collected for the calendar quarter, times the total number of enrolled Crow tribal members living on the Reservation.”). Other allocations are based on the population of all enrolled members, regardless of whether they live within the tribal territorial boundaries. *See* Northern Cheyenne Tribe-Montana Tobacco Tax Agreement, Northern Cheyenne Tribe-State of Mont., § 5(a), Mar. 20, 2012, <https://mtrevenue.gov/?mdocs-file=57543> (“The amount of tobacco taxes that the Tribe receives shall be determined by multiplying 150 percent of the Montana per capita tobacco tax collected for the calendar quarter, times the total number of all enrolled Northern Cheyenne tribal members living on the Reservation.”).

163. Other complex formulae for fuel-tax revenue sharing are based on fuel sold to exempt parties (a tribe or tribal members). *See* Intergovernmental Agreement Between Arizona Department of Transportation and Navajo Tax Commission: Establishing Cooperative Fuel Tax Administration, § 3.7, May 7, 1999, <https://sct.narf.org/documents/richardsvpbp/TRIBAL-STATE%20FUEL%20TAX%20AGREEMENTS/NAVAJO%20NATION-ARIZONA%20AGREEMENT.pdf> [hereinafter Navajo Arizona Agreement] (providing that the state agrees to refund state fuel taxes paid on sales to tribal members or entities based on vendor records).

164. *See* Fletcher, *supra* note 153, at 5; *see also* State of Michigan Generic Tax Agreement, Apr. 13, 2018, https://www.michigan.gov/-/media/Project/Websites/taxes/Tribal/Generic_StateTribal_Tax_Agreements_and_Amendments.pdf?rev=7be4d312f2d445508d042a26c16b347c.

165. *See, e.g.*, Tax Agreement Between the Bay Mills Indian Community and the State of Michigan, § III(B), Dec. 20, 2002, <https://www.michigan.gov/taxes/-/media/Project/Websites/taxes/Tribal/BayMillsFinalTaxAgreement.pdf?rev=256034e146e947ea93bdb7927cee6dcc&hash=E6BAD7D4DD6C045939E68718E8B24FDA> [hereinafter Bay Mills Agreement].

166. *See, e.g., id.*

167. *Id.* § III(B)(3)(a).

168. *Id.* § III(B)(3)(b).

169. *Id.* § III(B)(2).

compacts explain the formula for allocations based on population or estimates, but most do not.¹⁷⁰

It is impossible to evaluate the impact or fairness of a compact based on the revenue sharing arrangement without considering the arrangement, if any, between the state and the tribe for funding governmental services within the tribal territory.¹⁷¹ Compacts may also contain provisions that limit the tribe's spending of the revenue, often through a requirement that the tribe spend the revenue on broadly defined "essential governmental services."¹⁷²

Most tax compacts with revenue allocation provisions also address various tax administration issues. Tax administration issues such as recordkeeping, remittance and payment, auditing, and enforcing noncompliance are particularly important because of the doctrine of tribal sovereign immunity.¹⁷³ The administrative provisions in tax compacts allow states to avoid tribal sovereign immunity in enforcing the terms of the tax agreement.

Because many compacts address the imposition of state retail sales or excise taxes upon non-Indians in transactions where the tribe is acting as a retailer, common terms regarding tax administration prescribe the administrative obligations of a tribe in enforcing state taxes. For example, compacts address who bears the legal obligation for collecting taxes and remitting money to relevant tax authorities.¹⁷⁴ Provisions often address keeping records and other

170. See Winnebago Tribe Agreement, *supra* note 161, Part IV.9 (explaining allocation based on the non-Indian population residing within the territorial boundaries of the Tribe's reservation).

171. See, e.g., Paul Spruhan, *Standard Clauses in State-Tribal Agreements: The Navajo Nation Experience*, 47 TULSA L. REV. 503, 505–09 (2012) (discussing funding agreements outside the scope of tax revenue sharing between the Navajo Nation and the three states in which the Navajo Nation is geographically located); see also Cowan, *supra* note 144, at 27 (noting the difficulty in determining "winners" and "losers" of a compact without knowing spending arrangements, specifically on infrastructure and services in Indian Country).

172. Suquamish Tribe Agreement, *supra* note 146, § V(F)(1). This limitation on spending is particularly true in cases where the tribe is entitled to keep all the revenue generated by the on-reservation transactions. See, e.g., *id.*; Iowa Tribe Compact, *supra* note 160, art. II, §§ 7, 10–15 (allocating to the Tribe all excise tax revenue on tribal tobacco sales to non-Indians, and the Tribe agreeing to stamp requirements for tobacco). It also applies in cases where the revenue is split between the tribe and state. See Fort Peck Tribes Agreement, *supra* note 146, § VIII (allocating fifty percent of the tax revenues covered by the Agreement to the Tribe).

173. See *supra* Part I.B.2.c.

174. See, e.g., Fuel Tax Agreement Between the Pyramid Lake Paiute Tribe and the State of Nevada, at 2, Apr. 5, 2002, <https://sct.narf.org/documents/richardsvpbp/TRIBAL-STATE%20FUEL%20TAX%20AGREEMENTS/PYRAMID%20LAKE%20PAUIITE%20TRIBE-NEVADA%20AGREEMENT.pdf> [hereinafter Pyramid Lake Paiute Agreement] (delineating responsibility for all administration, enforcement, and collection, including imposition and collection of state fuel tax on "at-the-pump" purchases, to the tribe or tribal retailers); Bay Mills Agreement, *supra* note 166, § III(B) (requiring the Tribe to collect and remit applicable sales taxes as prescribed in agreement).

related documents.¹⁷⁵ Other enforcement issues include auditing, information sharing, and disclosures.¹⁷⁶

The terms of some compacts require the state to assume all administrative and enforcement responsibilities, even over transactions occurring in Indian Country by tribal retailers.¹⁷⁷ In order to accomplish this type of taxing structure, the legal incidence of the tax must fall on the wholesaler or distributor *before* the goods arrive in Indian Country for retail sale.¹⁷⁸ This may free a tribe from the cost of running its own tax enforcement agency, but it can also leave the tribe vulnerable to potential abuse from state enforcement.¹⁷⁹ In fact, multi-jurisdictional tax administration itself, irrespective of any revenue sharing, is so important that at least one state has compacts with tribes within its borders just to coordinate enforcement.¹⁸⁰

Compacts illustrate cooperative sovereignty—sacrifice of tribal sovereignty in exchange for certainty as to revenue and administration. Another universal feature of existing tax compacts is diversity—they reflect wide

175. *See, e.g.*, Bay Mills Agreement, *supra* note 166, §§ VIII–XII (containing five separate sections of administrative provisions). The Michigan tax compacts are somewhat unique, because they cover an array of taxes, including sales, fuel, tobacco, income, and business taxes. *See id.*; *see also* Navajo Arizona Agreement, *supra* note 163, § 3.12 (requiring that the Navajo Nation keep records such as invoices, receipts, and records required to support the terms of the compact and allowing the state to audit retailers within the reservation). *But see* Fuel Tax Agreement Between the Walker River Paiute Tribe and the State of Nevada, at 2, Nov. 21, 2002, <https://sct.narf.org/documents/richardsvpbp/TRIBAL-STATE%20FUEL%20TAX%20AGREEMENTS/WALKER%20RIVER%20PAIUTE%20TRIBE-NEVADA%20AGREEMENT.pdf> [hereinafter Walker River Paiute Agreement] (containing minimal administrative provisions, because the state pre-collects all taxes and refunds them to the Tribe based on the average consumption of the number of residents). Consequently, the state has no concerns about remittance and jurisdiction. *See* Walker River Paiute Agreement, *supra*.

176. *See, e.g.*, Navajo Arizona Agreement, *supra* note 163, § 3.9.2 (requiring specific books and recordkeeping by fuel distributors and vendors); Crow Tribe Agreement, *supra* note 162, § 7 (permitting either party to examine, audit, or use a private auditor, and requiring confidentiality of any investigation).

177. *See, e.g.*, Navajo Arizona Agreement, *supra* note 163, § 3.7 (explaining refund allocations made by the state to the Tribe for tax-exempt purchases).

178. Common examples of types of products include tobacco products or motor fuel, both of which can be taxed at the wholesale level. *See, e.g.*, Crow Tribe Agreement, *supra* note 162, § 5 (providing that the state tobacco tax be pre-collected from wholesalers and cigarettes marked with state tax insignia).

179. *But see* Pyramid Lake Paiute Agreement, *supra* note 174, at 2 (compensating the Tribe for tax enforcement by allowing the Tribe to retain ten percent of the revenue owed to the state).

180. For example, the state of New Mexico does not have revenue sharing compacts. However, it has numerous compacts that address tax administration across tribal territorial borders. *See* Cooperative Agreement Between New Mexico Taxation and Revenue Department and Pueblo de Cochiti Division of Revenue: Resolution No. 2006-01, § 1, Mar. 23, 2006, <https://klvg4oyd4j.execute-api.us-west-2.amazonaws.com/prod/PublicFiles/34821a9573ca43e7b06dfad20f5183fd/2f0598fd-5890-4b51-82d4-7b88d2e8cb22/Pueblo%20de%20Cochiti%20and%20NM%20Taxation%20and%20Revenue%20Department.pdf> (“The Department and the Division enter into this Agreement in order to provide for the exchange of information and the reciprocal, joint or common enforcement, administration, collection, remittance and audit of gross receipt taxes of the party’s jurisdictions.”). New Mexico also has a state tax credit available to businesses engaging in commercial activity in Indian Country that would otherwise be subject to taxation by both the tribe and the state. *See* N.M. STAT. ANN. § 7-9-88.1 (1978). Because of this credit, revenue allocations are unnecessary to resolve potential duplicative taxation.

variations in the types of state and tribal taxes, tax and economic policy objectives, available resources, and geographic factors.¹⁸¹

II. ANALYSIS OF THE IMPACT COMPACTS HAVE ON TRIBAL ECONOMIC DEVELOPMENT

As explained in the previous Part, tribal governments cannot realize self-determination without economic self-sufficiency.¹⁸² Economic self-sufficiency depends on economic development, which itself has two components: (1) investment by business ventures, and (2) tax revenues generated by the ventures.¹⁸³ Because juridical taxation threatens economic development by forcing a tribe to choose between generating tax revenue or the business venture itself, compacts offer a compromise.¹⁸⁴

Evaluation of the relative merits of tribal-state tax compacts has mostly been confined to skeletal analysis of the pros and cons for both compacting parties.¹⁸⁵ Existing literature claims that compacts provide multiple advantages for both tribes and states. Compacts help avoid litigation over taxing authority, which gives the parties certainty over tax revenues and enables advanced planning of government budgets.¹⁸⁶ Compacts are also viewed as a “more viable” option for tribes compared to legislative solutions to tax issues.¹⁸⁷ However, compacting has downsides for tribal governments, in that tribes may come to the table with unequal bargaining power relative to the state, leading the tribe to “surrender more rights” than it would in an equal negotiation.¹⁸⁸

It is important to keep in mind that the quantity and diversity of tribal nations makes it impossible to distill any generalized principles from the pros and cons of compacting that apply to all Indian Country. Each of the fifty states and each of the 574 federally recognized Indian tribes (plus additional state recognized tribal governments) have their own economies, resources, and governmental priorities.¹⁸⁹

The analysis here does not purport to resolve the question of whether compacting is net positive or net negative for tribes and states. Instead, it offers a deeper understanding of compacting and the relationship between compacting and tribal economic development, using the two categories of transactions outlined in the previous Part.

181. See *supra* Part I.B.1 (discussing state and local tax revenue streams and tribal tax revenue streams).

182. See *supra* Part I.B.

183. See *supra* Part I.B.1.

184. See *supra* Part I.B.1.

185. See Cowan, *supra* note 4, at 134–35.

186. *Id.* at 134 & nn.219–20.

187. *Id.* at 134 & nn.221–22. But see Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1799 (2019) (arguing that Congress and the executive branch have “provided sanctuary” for tribes through lobbying).

188. See Cowan, *supra* note 4, at 134–35, 134 nn. 221–23.

189. See *supra* Part I.A.3.

This Part breaks down into three strands of analysis. First, it analyzes the incentives states and tribes have in creating tax revenue compacts to understand the correlation between compacts and tribal economic development activities. The incentives reveal states' and tribes' motivations for compacting. Those motivations suggest that when a tribe is acting as a retailer, the tribe itself may have continued or even increased economic opportunities and yet struggle to attract outside investors to partner in economic development activities within Indian Country. Second, using tax policy principles to assess the impact compacts have on economic development, this Part identifies and analyzes costs. Finally, this Part posits an alternative framework warranting further research that addresses juridical taxation and stimulating economic development in Indian Country.

A. THE PARTIES' INCENTIVES TO COMPACT CORRELATE WITH ECONOMIC DEVELOPMENT OPPORTUNITIES IN INDIAN COUNTRY.

The efficacy and value of compacts cannot be measured simply in absolute dollars or revenue generated by the governmental entities under the compact, because that ignores the economic value created by the business venture itself. Instead, a more useful question in evaluating the relative benefits of compacting is what impact compacts have on tribal economic development at large. What business ventures does the compact encourage, and what additional revenue is derived from taxing those ventures?

Existing law shapes the incentives for states and tribes to compact. The incentives vary depending on whether the transaction being taxed is a tribe-as-retailer or a tribe-as-partner transaction. In turn, the incentives yield compacts that reveal the economic development opportunities—or the lack thereof—available to tribes.

1. *The Incentives To Compact in Transactions Where the Tribe Is a Retailer*

Under existing law, when a tribe is engaged in business as a retailer within Indian Country, consumers who are not members of the particular Indian tribe within whose territory the business is located may be subject to both state and tribal consumption taxes.¹⁹⁰ Only in cases in which the tribe “adds value” to the item sold will a state tax be invalidated.¹⁹¹ While states and tribes may dispute what constitutes the added value sufficient to preempt state taxes, the law is otherwise relatively certain as to when a state has concurrent taxing authority,

190. Courts have also interpreted state authority as regulating “nonmember Indians” within Indian Country, in addition to regulating non-Indian individuals and businesses. *See, e.g.,* *Washington v. Confederated Tribes of the Colville Rsrv.*, 447 U.S. 134, 161 (1980) (determining that nonmember Indians “stand on the same footing” as non-Indians); *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997) (drawing the line for civil jurisdictional authority between tribal members and nonmembers); *see also supra* Part I.B.

191. *See supra* Part I.B.2.c.

especially in the case of tribes selling tobacco.¹⁹² When both the state and tribe have concurrent authority to tax, as a practical matter, a tribe will be forced to either cede taxing authority or impose additional tribal taxes on the nonmember consumer and risk losing retail sales opportunities altogether.¹⁹³ Furthermore, a state can impose administrative burdens on a tribe to collect a tax.¹⁹⁴ To enforce or collect the tax, states still face the obstacle of tribal sovereign immunity.¹⁹⁵

Thus, under existing law, tribes are incentivized to compact with states for tax revenue, because the imposition of both state and tribal taxes would deter consumers from doing business in Indian Country, and by extension chill economic development for the tribe. In such scenarios, a tribe will be motivated to compact based on the reasoning that ensuring some revenue sharing or market share in retail sales is better than none. For example, the provisions on revenue sharing in Michigan's standard tax compact allocate revenue according to retail gross receipts.¹⁹⁶ Under the terms of those compacts, tribes are entitled to the first two-thirds of tax revenue generated on the first \$5 million in receipts.¹⁹⁷ For gross receipts over \$5 million, the tribe and state split the revenue fifty-fifty.¹⁹⁸ For Michigan tribes that agree to these terms, reducing the share of the revenue appears to be an acceptable term.

Existing law creates different, but no less compelling, incentives for states to enter tax compacts that cover transactions where the tribe is a retailer. States have nothing to lose from seeking juridical taxation, and everything to gain.¹⁹⁹ States are, however, motivated to engage in tax revenue compacts to create administrative cohesion for tax enforcement across tribal boundary lines. Retail-level sales or excise taxes are difficult to enforce, especially by a state government attempting to collect from another sovereign, the tribal government.²⁰⁰ Although the law has developed in a manner favorable to states even on enforcement, the costs associated with enforcing the law and requiring tribal governments to comply with recordkeeping and remittance of sales and excise taxes are strong incentives for a state to compact. Many, if not most or even all, of the compacts regarding tax revenue sharing also include agreements regarding administration such as recordkeeping, auditing practices, and remittance.²⁰¹

192. See *supra* Part I.B.2.c.

193. See *supra* Part I.B.3 for a discussion on the double bind of juridical taxation.

194. See *Colville*, 447 U.S. at 160.

195. See *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509–10 (1991).

196. See, e.g., Bay Mills Agreement, *supra* note 166, § III(B); see also *supra* Part I.C.2.a.

197. See, e.g., Bay Mills Agreement, *supra* note 166, § III(B).

198. *Id.*

199. See *supra* Part I.B.3. Because the retailers who would suffer from concurrent taxation are tribes or tribal entities, states face no risk in imposing their tax on tribal retailer sales.

200. See *supra* Part I.B.2.c (discussing a state's ability to require a tribe to collect and remit taxes to the state).

201. See *supra* Part I.C.2.b (providing examples of agreements as to tax administration matters between tribal governments and states).

Another incentive for states to enter tax revenue compacts stems from fear of competition from tribal retail ventures. Even though the law regarding concurrent taxation and administration favors states, states frequently accuse tribes of attempting to market an exemption from state tax in an unfair way.²⁰² This is especially true in the context of excise taxes, such as those on tobacco, fuel, and alcohol.²⁰³ This perceived unfair practice motivates states to compact in order to preempt tribes from attempting to market an exemption in the first instance, thereby avoiding litigation.²⁰⁴ Existing law creates different incentives for tribes and states, but these incentives are similar in importance to each. Tribes are motivated to resolve juridical taxation issues and preserve revenue streams and market shares, while states are motivated to resolve administrative issues and avoid contending with tribal sovereign immunity in order to enforce state taxes.

2. *The Incentives for States and Tribes in Transactions Where a Tribe Is Acting as Partner with Nonmember Businesses*

Under existing law, when a tribe partners with nonmember businesses to engage in commercial activity within Indian Country, the nonmember individual or entity may be subject to both state and tribal taxation for the commercial activity.²⁰⁵ Courts employ the *White Mountain Apache* analysis to determine the validity of state taxes on these commercial activities; this analysis is complex and can yield seemingly contradictory results.²⁰⁶ The complexity and uncertainty in these types of cases influence states' and tribes' incentives in different ways.

The lack of certainty over what taxation authority states have over nonmember commercial activity in Indian Country likely motivates tribes to compact with states to alleviate juridical taxation over nonmembers who do business in Indian Country. This is the same incentive tribes have with respect to transactions in which tribes are acting as retailers.

The lack of certainty surrounding taxing authority over nonmembers doing business with tribes as partners does not impact the incentives of the state in the same way. As in transactions where the tribe is a retailer, a state has nothing to lose in seeking to tax transactions where the tribe is a partner with nonmember businesses. Unlike tribal retailer transactions, the administrative challenges in

202. COHEN, *supra* note 1, § 8.03[d] & n.167.

203. *See supra* Part I.C.

204. There is a double standard in this jurisprudence; while it denies tribes the sovereignty to impose a consumption tax of their choosing, it ignores the reality of tax havens and tax arbitrage that happens at the interstate level. *See Fletcher, supra* note 66, at 787–88, 787 n.188. At the interstate level, such tax arbitrage is accepted and well known. For example, tax arbitrage occurs at the border of Washington and Oregon. Oregon has no sales tax and Washington has no individual income tax. High net earners can reside in Washington and work in Portland to avoid state income tax. Similarly, consumers in Vancouver can shop in Oregon to avoid sales tax.

205. *See supra* Part I.B.

206. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980); *see also supra* Part I.B.2.c.

enforcing the tax are different in transactions where the tribe is a partner. In transactions where a state asserts taxing authority over the business affairs of a nonmember, the state has minimal concerns regarding tax enforcement and administration. The state already has taxing authority over the nonmember by virtue of the business's residence within the state.²⁰⁷

Another reason a state may lack incentive to compact is because a state may be indifferent or adverse to encouraging additional economic development in Indian Country. Indifferent at best and adverse at worst, a state may see the tribe as competition to its own economic development.²⁰⁸

The incentives for tribes and states in transactions where the tribe is a partner are therefore asymmetrical in importance. Tribes, often eager to engage and attract outside business investment, remain incentivized to compact around juridical taxation to encourage that investment. States, however, have no administrative challenges to contend with in enforcing taxes on non-Indian businesses within the state, and consequently may not be interested in compacting to help tribal economies grow.

3. *Existing Compacts Between Tribes and States Reflect the Incentives of the Parties and Reveal the Impact Compacts Have on Economic Development Opportunities in Indian Country in Both Types of Transactions.*

Existing compacts between tribes and states reflect the incentives, or lack thereof, of the parties. There are many compacts involving transactions where the tribe is a retailer, such as compacts resolving sales and excise taxes, because the parties are both incentivized to compact in such situations.²⁰⁹ This is especially evident in the number of compacts addressing tribal sales of tobacco, fuel, and alcohol.²¹⁰

Given the lack of incentives for a state to enter a compact where a tribe is a partner, it is unsurprising to see that few compacts address taxation of nonmembers doing business with tribes as partners in Indian Country. Almost all the tax revenue compacts related to non-Native American Indian businesses

207. Generally, a state has broad constitutional taxing authority over the income earned by its residents. See 2 JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION: SALES AND USE, PERSONAL INCOME, AND DEATH AND GIFT TAXES, AND INTERGOVERNMENTAL IMMUNITIES ¶ 20.04[1] (3d ed. 1998).

208. See Matthey L.M. Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal-State Relations*, 43 TULSA L. REV. 73, 73–74 (2007) (explaining how the "age-old, intergenerational enmity between the people of Indian communities and the non-Indians who live on or near Indian Country" has changed from physical to political and legal violence and economic competition). There is empirical evidence that proves that when tribal economies thrive, the state and local governments in which the tribe is located also benefit economically. See Kelly S. Croman & Jonathan B. Taylor, *Why Beggar Thy Indian Neighbor? The Case for Tribal Primacy in Taxation in Indian Country*, JOINT OCCASIONAL PAPERS ON NATIVE AFFS., May 4, 2016, at 14–17 (providing examples of how tribal economic development helps grow state and local economies). For further literature and citations, see generally Browde, *supra* note 75.

209. See *supra* Part I.C.

210. See *supra* Part I.C.

involve the development or processing of natural resources existing in Indian Country.²¹¹

However, a recent compact between the Tulalip Tribes and the state of Washington is an exception.²¹² Rather than involving natural resources, the Tulalip compact addresses state and local business-operations taxes and retail sales taxes applied to nonmember retail businesses that operate within Tulalip property.²¹³ The compact was entered into to settle a dispute after a federal district court issued an opinion adverse to the tribe.²¹⁴ At issue in the case were state and local sales taxes and a state business-operations tax imposed on sales at a retail shopping center operating on the Tulalip Reservation.²¹⁵ Notably, most of the retailers were nonmember businesses.²¹⁶

The Tulalip compact allocates all business-operations tax revenue to the Tribes.²¹⁷ With respect to sales and use taxes, the first \$500,000 of revenue is allocated to the Tribes.²¹⁸ For revenue in excess of \$500,000, the allocation formula depends on whether a tribe has made a “qualified capital investment.”²¹⁹ The “qualified capital investment”—which is also a part of the deal—means that a tribe agrees to invest \$35 million in the construction of a “civil commitment facility” within its territory, apparently in exchange for tax revenue.²²⁰

The Tulalip compact appears to be unique in addressing a state tax on a nonmember business operating within Indian Country. Other than in the context

211. *See supra* Part I.C.

212. Tax Sharing Compact Between the Tulalip Tribes and the State of Washington, Tulalip Tribes-Wash., July 1, 2020, <https://www.hca.wa.gov/assets/program/tax-sharing-compact-tulalip-tribes-of-wa-and-wa-state.pdf> [hereinafter Tulalip-Washington Tax Sharing Compact].

213. *Id.* art. IV, §§ 3, 13–14 (defining “compact covered area,” “nonmembers,” and “nonmember businesses”).

214. Tulalip Tribes v. Washington, 349 F. Supp. 3d 1046, 1062–63 (W.D. Wash. 2018); *see also Washington’s Tulalip Tribes Reach Settlement with State, County in Tax Lawsuit*, TRIBAL BUS. NEWS (Feb. 3, 2020), <https://tribalbusinessnews.com/sections/policy-and-law/11794-washington-s-tulalip-tribes-reach-settlement-with-state-county-in-tax-lawsuit>. The preamble to the compact notes that “both the Tulalip Tribes and the State desire a positive working relationship in matters of mutual interest and seek to resolve disputes and disagreements by conducting discussions on a government-to-government basis.” Tulalip-Washington Tax Sharing Compact, *supra* note 212, art. I.

215. *Tulalip Tribes*, 349 F. Supp. 3d at 1052–53. The *Tulalip Tribes* case offers an example of how the two categories of economic development opportunities—tribes as retailers and tribes as partners—are oversimplified. In *Tulalip Tribes*, the State sought to impose both retail sales taxes and business-operations taxes over the non-tribal businesses. *Id.* The imposition of state consumption taxes over sales to nonmember consumers by non-tribal retailers in Indian Country is a twist not addressed in the two categories identified for the purposes of this Article. That the two types of economic development opportunities do not easily address such a twist is not of serious consequence, because the construction of the retail space by the Tulalip Tribe was based on the Tribe’s unique geographic location. *Id.* at 1049 (explaining how the retail center was located near metropolitan Seattle). Thus, the case presented a set of circumstances not likely to be replicated by many other tribes.

216. *Id.* at 1062–63. This point to emphasize is that this is not a scenario where the tribe is a retailer.

217. Tulalip-Washington Tax Sharing Compact, *supra* note 212, art. V, § 2(a).

218. *Id.* art. V, § 2(b).

219. *Id.* art. V, § 2(c)(2), (d)(2).

220. *Id.* art. VI (defining “qualified capital investment,” and setting forth terms for the tribe to construct the civil commitment facility).

of severance taxes on the extraction of natural resources, there do not appear to be any other compacts that address the tax consequences of transactions where the tribe is a partner.²²¹ The Tulalip compact is also unique in that it shows how revenue sharing can be inextricably connected with a funding arrangement. The Tribes agreed to invest and build a facility at a cost of \$35 million in exchange, at least in part, for tax revenue.²²² This highlights the complexity of funding agreements between tribes and state and local governments.

Existing compacts, based on the incentives for states and tribes, reveal the impact compacts have on economic development opportunities in Indian Country. For economic opportunities where a tribe is a retailer, both states and tribes are incentivized to compact. In compacts that cover tribe-as-retailer transactions, tribes protect their market stake in retail transactions, and possibly the sales tax revenues. States ensure that retail taxes are easy to enforce across territorial borders in Indian Country. The research in this Article demonstrates that numerous compacts cover such transactions.²²³

Where a tribe seeks to partner with nonmember businesses for development in Indian Country, however, states are not incentivized to compact, because there are no barriers to enforcement of state tax in such scenarios. The lack of incentives for states correlates with few existing compacts that address transactions where tribes partner with non-Indian businesses. The lack of compacts makes it harder for tribes to attract investors and encourage outside business to engage in Indian Country, stymieing economic development.

This is not to say that the lack of compacts is the causal explanation for why tribes struggle to secure outside investment. Juridical taxation, whether actual or potential, is just one obstacle tribes face in attracting outside investment and business development. There are other issues such as lack of infrastructure, geographic distance, and lack of specialized workforces.²²⁴ Furthermore, the normal rules of engagement for business investment are different in Indian Country, leading to a challenging landscape for investors.²²⁵ These are factors tribes consider when creating economic development opportunities.²²⁶

The existence of compacts between states and tribes that address transactions where the tribe is a retailer correlates with increased economic

221. It is difficult, if not entirely impossible, to quantify the negative. Furthermore, existing compacts can be challenging to locate. *See, e.g.,* Cowan, *supra* note 144, at 12–13 (noting the difficulties in locating existing compacts and the consequences of such absence of information).

222. Tulalip-Washington Tax Sharing Compact, *supra* note 212, art. VI.

223. All the compacts referenced in Part I.C.2.a of this Article, with the exception of one—the Fort Peck Tribes and State of Montana Oil and Gas Production Tax Agreement—cover transactions where the tribe is acting as a retailer. *See supra* notes 151, 154, 156, 158, 161–68, 170–71, 175. *Cf.* Part II.A.3 (discussing few compacts that exist where the tribe is acting as partner).

224. *See* Cowan, *supra* note 4, at 95 & nn.13–16 (citing testimony of Peterson Zah, President of the Navajo Nation).

225. *See* Fletcher, *supra* note 66, at 785–87 (discussing structural discrimination in financing, lack of acceptable collateral, tax rules with tribally issued municipal bonds, and capital flight as additional barriers to tribal economic development).

226. *See supra* Part I.B.3.

development opportunities for tribes. Compacts resolve the potential loss of consumers for the tribe, should the state impose a duplicative tax, and settle any potential enforcement challenges for the state. However, the lack of compacts that address transactions where the tribe is a partner with non-Indian businesses makes it challenging for tribes to attract investment from these businesses and encourage them to engage in commercial activity within Indian Country.

B. COMPACTS HAVE ADDITIONAL NEGATIVE CONSEQUENCES THAT HAVE NOT BEEN PREVIOUSLY ADDRESSED IN EXISTING LITERATURE.

Compacts can also be analyzed under tax policy principles to determine their impact on economic development opportunities. Compacts have been described as an “incomplete” solution to juridical taxation.²²⁷ Existing literature cites the downsides of compacting as creating agreements that are unfair to tribes and politically untenable, in that they foster distrust among non-tribal voters.²²⁸ These concerns assume that compacting alone, if executed fairly and insulated from political pressure, will solve the problem of juridical taxation.²²⁹

However, those assumptions miss a critical perspective. From a tax policy perspective, compacting also degrades tax neutrality and creates economic distortions, which ultimately hinder tribal economic development opportunities.

An overarching goal of tax policy is a principle that tax laws should be “neutral.”²³⁰ Tax neutrality principles require that a tax system be designed to minimize the impact the tax system has on individual choices.²³¹ Tax neutrality thus requires that the tax system not distort the economy.²³² In the context of disputes over juridical taxation in Indian Country where there is a geographic boundary between differing tax laws, the principle of tax neutrality is referred to as a locational neutrality.²³³

For example, historically, some tribal governments have tried to leverage their sovereignty from state tax laws to attract investment. Some tribes marketed retail sales on their reservations as free from state taxation, offering sales-tax-

227. See Cowan, *supra* note 4, at 135.

228. See *id.* at 134–35. Voter distrust has been cited as a downside to compacting. *Id.* at 135 (“[V]oters may view compacts skeptically.”). The particular concern is that members of non-Indian communities may voice political disagreement with compacting. See *id.* This distrust is based on historical prejudices, misunderstanding of tribal economics, and racial enmity. See Fletcher, *supra* note 66, at 789–92 (providing examples of anti-Indian rhetoric regarding perceived injustices favoring Indian people).

229. This Article does not argue that the concerns with compacting articulated in other articles are invalid or unimportant. To the contrary, the analysis raises additional concerns about the use of compacting.

230. McMAHON, *supra* note 73, at 103.

231. *Id.* at 104. For examples of tax neutrality, pareto efficiency, and citations to tax policy literature and economic literature in support of those policies, see David Elkins, *A Critical Reassessment of the Role of Neutrality in International Taxation*, 40 *Nw. J. INT’L L. & BUS.* 1, 8–14 (2019).

232. McMAHON, *supra* note 73, at 102 (“[S]ignificant attention should be given to ensure that the taxes that must exist do not distort choices any more than necessary to permit the free market to operate as best as possible.”).

233. See Cowan, *supra* note 4, at 126. Professor Cowan discusses distortions resulting from taxation in Indian country vis-à-vis cigarette tax cases. *Id.* at 114–17.

free shopping.²³⁴ This is a common practice among state and local governments. There are numerous recent examples of states and local governments creating tax incentives to attract investment or businesses.²³⁵ For example, when Amazon shopped for the location of a second corporate headquarters, it sought state and local tax incentives that allegedly cost taxpayers \$3.4 billion.²³⁶ However, the case law that developed in response to tribes engaging in the same practice prevents tribes from leveraging a state tax exemption to attract consumers.²³⁷ This so-called “race to the bottom,” where a state or municipality concedes tax revenues to attract business investment, is a familiar predicament for tribes forced to choose between imposing tribal taxes and attracting business.²³⁸ These examples violate principles of tax neutrality, because they encourage transacting parties to make decisions based on tax advantages rather than on other, non-tax-related factors.

Compacting similarly violates principles of tax neutrality and creates economic distortions. Compacting allows tribes and states to agree on terms that deviate from otherwise generally applicable tax law.²³⁹ This deviation may create a lack of consistency in applicable law as between tribal nations, which in turn could further destabilize reservation economies.²⁴⁰

The distortion caused by compacts depends on the category of transaction the compact governs. In transactions where a tribe is acting as a retailer, inconsistent tax laws are most likely to hurt the tribe and not impact the consumer. The existence of a compact in transactions where a tribe is a retailer

234. This double standard permits states and local governments to do what tribes are forbidden from doing. *See supra* Part I.B.

235. *See supra* Part II.A.

236. *See* Jacob Passy, *This Is What Amazon’s ‘HQ2’ Was Going To Cost New York Taxpayers*, MARKETWATCH (Feb. 16, 2019, 4:13 PM), <https://www.marketwatch.com/story/what-amazons-hq2-means-for-taxpayers-in-new-york-and-virginia-2018-11-14>.

237. *See supra* Part I.B.3.

238. *See supra* Part I.B.3.

239. *See supra* Part I.C for examples of compacts where the applicable rate of tax in Indian Country is different without the compact. This proposition, however, is not categorically descriptive of all possible tax revenue compacts. Such compacts can include any terms agreed on by the parties, including a statement confirming that the applicable law is that which is already in force under relevant tribal and state law. *See supra* Part I.C.1.

240. A recent example may be instructive here. The state of Washington has twenty-five motor fuel compacts with various Indian tribes located within the state. WASH. STATE DEP’T OF LICENSING, 2019 TRIBAL FUEL TAX AGREEMENT REPORT 2 (2020), <https://www.dol.wa.gov/about/docs/leg-reports/2020-Tribal-Fuel-Tax-Report.pdf> (categorizing existing tribal-state fuel tax compacts). The Yakama Indian Nation, located within Washington state, is not one of them. *See id.* After the state asserted authority to impose its fuel tax on intra-reservation fuel consumption by the Yakama Tribe, litigation ensued. *Cougar Den, Inc. v. Wash. State Dep’t of Licensing*, 392 P.3d 1014, 1014–15 (Wash. 2017). Yakama Indian Nation maintained, and the Supreme Court ultimately agreed, that the Washington state fuel tax did not apply based on treaty language. *Wash. State Dep’t of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1006 (2019). The litigation does not substantiate any assertion that the lack of a compact between Yakama and Washington negatively impacted the Yakama Nation’s economy. The example does highlight some of the costs for tribes without a compact—in this case, litigation. The foundational issue of the entire dispute was Yakama’s right to travel for trade purposes, emphasizing the connection between compacting and tribal economies. This example also highlights how Federal Indian law itself lacks uniformity.

does not hurt the consumer, because the tax rate remains the same for the consumer. However, the inconsistency created by existing compacts does hurt tribes, because a tribe without a retail sales tax compact has to choose between imposing a tribal tax to generate revenue and attracting consumers.²⁴¹ Accordingly, tribes without compacts will likely lose retail opportunities if they impose a tribal retail tax, or have no revenue stream if they forgo the tax.²⁴²

In transactions where the tribe is acting as a partner with nonmembers, the lack of consistency has a broader negative impact on tribal and state economies. Because few compacts address taxes that arise when tribes act as partners, leaving the state tax consequences of transactions uncertain, tribal governments may struggle to attract outside investors and business development.²⁴³ This particularly impacts the activities of nonmember businesses partnering with tribes to extract or produce tribal natural resources, because many tribes need outside contractors to engage in such activities.²⁴⁴ Economic analyses show that tribes may not command market rates for resources when tax consequences are uncertain.²⁴⁵ As with transactions where a tribe acts as a retailer, the lack of a compact where a tribe acts as a partner negatively impacts the tribe.

These distortions from a system that violates tax neutrality have negative impacts beyond reservation economies. When tribal resources are not utilized and reservation economies remain undeveloped, state and local governments miss out on opportunities for growth, too.²⁴⁶ As the economy on a reservation grows, so grows the economy of the state in which the tribe is located.²⁴⁷

This analysis seeks to import notions of tax neutrality into a question of Federal Indian law, though it is important to note that tax policy principles may not easily align with principles of Federal Indian law. Compacts notwithstanding, state tax law can apply inconsistently among tribal nations based on respective treaties, making tax neutrality difficult to achieve. For example, in *Washington State Department of Licensing v. Cougar Den, Inc.*, the Yakama Indian Nation was the only tribe in the state of Washington without a tax compact resolving the applicability of state fuel taxes.²⁴⁸ The Tribe claimed that tribal retailers were exempt from state fuel taxes based on particular

241. See *supra* Part I.C for examples of how compacts remove the double taxation issue as to the consumer.

242. See *supra* Part I.B.3.

243. See *supra* Part I.B.3; see also Jensen, *supra* note 1, at 3–4 (“If a prudent investor cannot predict the tax liability he will incur on his investment with reasonable certainty, he is likely to look for investment opportunities elsewhere.”).

244. See Cowan, *supra* note 4, at 121 (citing to authority on development of natural resources).

245. See *id.* at 121–22.

246. These principles are distilled from the economic concept of “growing the pie,” or “pareto efficiency.” See McMAHON, *supra* note 73, at 103 (discussing the pareto efficiency principle). This principle is essentially that, rather than tribes and states fighting over the tax revenue generated by tribal economies, policies where a state cedes taxing authority, thereby stimulating economic growth for the tribe, will have corresponding economic growth for the surrounding localities off-reservation. See Croman & Taylor, *supra* at note 208, at 14–17; see also Crepelle, *supra* note 4, at 703 (documenting how reservation economies remain undeveloped).

247. See McMAHON, *supra* note 73, at 103 (discussing the pareto efficiency principle).

248. 139 S. Ct. 1000 (2019); see also WASH. STATE DEP’T OF LICENSING, *supra* note 240, at 2.

language in the Tribe's treaty with the federal government.²⁴⁹ The Supreme Court ultimately held that the treaty preempted application of general state tax law, and thus that the Yakama Tribe and its tribal retailers were exempt from the state tax law.²⁵⁰ The case ultimately was an expensive and time-consuming process for the Tribe to protect its sovereignty and tax revenues. Moreover, the result in *Cougar Den* was only because of the unique nature of the Tribe's treaty,²⁵¹ illustrating how state tax law can apply inconsistently among tribal nations based on respective treaties.

Furthermore, tax policy concerns are different from concerns focused on protecting tribal sovereignty. What may be good tax policy (i.e., a neutral set of rules) may ignore the important value of a tribe exercising its sovereignty to pursue a compact (or not, as the Yakama Nation example demonstrates), even if the existence of a compact between a particular state and a particular tribe creates economic disincentives for another tribe.

This analysis should not be read to suggest that tax policy principles are more important than promoting tribal sovereignty. The complicated reality of Federal Indian law is that policies with respect to the 574 tribal nations, each with its own values, culture, and preferences, may vary in how the tribe chooses to propel itself toward self-sufficiency.²⁵² That said, tribal sovereignty is not an isolated, independent goal. There is a practical element to sovereignty, namely economic self-sufficiency, that may be best achieved when both state and tribal governments adhere to sound tax policy objectives.

C. ALTERNATIVES TO COMPACTING CAN ADDRESS JURIDICAL TAXATION PROBLEMS BETWEEN TRIBES AND STATES.

If tribal economic development is the goal, and juridical taxation is an impediment, it is logical that the literature has focused on compacts to resolve juridical taxation. The analysis thus far challenges the existing literature and can be summarized as follows. First, states lack incentives to compact, especially in transactions where the tribe is acting as a partner with non-Indian businesses. The lack of incentives correlates with few compacts and diminished economic development opportunities for tribes to partner with outside investors and businesses.²⁵³ Second, the use of compacts among tribes has a distortive economic impact, reducing economic opportunities for tribes.²⁵⁴ This seemingly contradictory set of conclusions—that the lack of compacts reduces economic development opportunities and that the compacts themselves reduce economic

249. *Cougar Den*, 139 S. Ct. at 1005–06. After losing at the state trial and appellate level, Yakama County and the state of Washington litigated the case all the way up to the Supreme Court. *Id.* at 1000–01.

250. *Id.* at 1006.

251. *Id.*

252. *See Tribes*, U.S. DEP'T OF THE INTERIOR: INT'L AFFS., <https://www.doi.gov/international/what-we-do/tribes> (last visited Dec. 5, 2022).

253. *See supra* Part II.A.

254. *See supra* Part II.B.

development opportunities—creates confusion over what a potential solution to juridical taxation might be.

The literature has conceived the solution to juridical taxation in Indian Country as using narrow tools.²⁵⁵ Beyond compacting, other tools for resolving juridical taxation involve federal policy. For example, the federal government could create federal credits for juridical taxes paid in Indian Country, or increase direct payments to tribes to account for forgone revenue in ceding taxing authority to the state.²⁵⁶ A common argument is for Congress to preempt state taxation in Indian Country.²⁵⁷ Other tools could involve policy changes at the state level to allow for tribal primacy in taxation.²⁵⁸

While these tools may reinvigorate tribal governments with much-needed cash, they do nothing to promote economic self-sufficiency, which is foundational to tribal sovereignty and self-determination.²⁵⁹ Furthermore, given the problems with non-Indian public perception and historical prejudices, there are significant hurdles to policy-based approaches.

A broader rethinking of juridical taxation by both scholars and the courts is taking place. Professor Maggie Blackhawk has articulated a new framework for understanding the role of tribal governments in the U.S. constitutional system.²⁶⁰ Professor Blackhawk argues that Indigenous peoples and their communities are best served when the federal government has “bestow[ed] power, not rights, through the recognition of inherent tribal sovereignty.”²⁶¹ She argues for tribal sovereignty as a solution, contending that tribes should be able to “reclaim[] homelands and the political and economic power sufficient to govern them.”²⁶²

The Supreme Court has similarly recognized the importance of territorial sovereignty in the recent case *McGirt v. Oklahoma*.²⁶³ The legal issue in *McGirt* was the reach of state authority in a geographic area that the Muscogee Creek

255. Cowan, *supra* note 4, at 133–34; Ansson, *supra* note 8.

256. Cowan, *supra* note 4, at 140–42 (federal credit system); *id.* at 142–43 (increasing direct payments).

257. *Id.* at 143 & n.267.

258. See Browde, *supra* note 75, at 29.

259. See generally, e.g., Crepelle, *supra* note 4 (examining the relationship between tribal sovereignty and reservation economic development); see also Adam Crepelle, *Decolonizing Reservation Economies: Returning to Private Enterprise and Trade*, 12 J. BUS. ENTREPREN. & L. 413, 455–58 (2019) (arguing how reforming Federal Indian law can help develop tribal economies).

260. See Blackhawk, *supra* note 187, at 1797.

261. *Id.* at 1798. Professor Blackhawk has argued that compacting is a mechanism for the tribal government to “represent the collective needs of [its] citizens.” *Id.* at 1867.

262. *Id.* at 1861–62.

263. 140 S. Ct. 2452 (2020). *But see* *Oklahoma v. Castro-Huerta*, No. 21-429, slip op. at 1–3 (U.S. 2022) (revisiting questions of territorial sovereignty and tribal jurisdiction). Unfortunately, any reliance on a cohesive, pro-tribal sovereignty shift in doctrine from the current Supreme Court would be misguided. See Matthew L.M. Fletcher, *In 5-4 Ruling, Court Dramatically Expands the Power of States To Prosecute Crimes on Reservations*, SCOTUSBLOG (June 29, 2022, 12:35 PM), <https://www.scotusblog.com/2022/06/in-5-4-ruling-court-dramatically-expands-the-power-of-states-to-prosecute-crimes-on-reservations/>; Nick Martin, *The Supreme Court’s Attack on Tribal Sovereignty, Explained*, HIGH COUNTRY NEWS (July 1, 2022), <https://www.hcn.org/articles/indigenous-affairs-justice-law-the-supreme-courts-attack-on-tribal-sovereignty-explained>.

Tribe claimed was Indian Country, despite Oklahoma's longstanding treatment that the reservation had been disestablished.²⁶⁴ Agreeing with the Tribe, the Supreme Court held that the reservation had remained, emphasizing the importance of territorial sovereignty and the promises made to the Tribe at the time a treaty had been made with the federal government.²⁶⁵

The tools for resolving tribal-state juridical taxation have been constrained by limited conceptions of tribal sovereignty. Though tribes are sovereign in many respects, the judiciary has cabined the power of tribes as “domestic dependent nations.”²⁶⁶ Tribal governments are extra-constitutional or pre-constitutional sovereigns—analogueous to neither foreign nations nor states.²⁶⁷ Invigorating territorial sovereignty—and moving away from jurisprudence entrenched in the legacy of allotment and termination—could provide the necessary backdrop for solutions to eliminate juridical taxation.

Specifically, if tribal governments are afforded increased territorial sovereignty by restricting state encroachment in Indian Country, it is possible that the federal constitutional requirement of fair apportionment could apply. Fair apportionment is one of four judicially constructed requirements that ensures that a state tax does not unconstitutionally interfere with interstate commerce.²⁶⁸ Fair apportionment prevents a taxing state from taxation overreach; it constrains the taxing state by limiting the extent to which an

264. 140 S. Ct. at 2459. The specific issue involved state criminal jurisdiction over an individual Indian person within the geographic area. *Id.* at 2456–57.

265. *Id.* at 2482. Whether *McGirt* represents a dramatic pivot in federal jurisprudence remains to be seen. There have been several changes in the makeup of the Supreme Court since the opinion was issued, and it is hard to predict whether a shift will happen, let alone how such a shift will impact taxation. *See, e.g.,* Stacy L. Leeds & Lonnie Beard, *A Wealth of Sovereign Choices: Tax Implications of McGirt v. Oklahoma and the Promise of Tribal Economic Development*, 56 TULSA L. REV. 417, 423 (2021) (analyzing *McGirt's* potential impact on federal, state, local and tribal taxing authority).

266. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

267. *Id.* at 16. Although Justice Marshall referred to the Cherokee Nation as a “state,” it was not meant to convey the same meaning or the same status that applied to states under the Constitution. *Id.* Instead, “state” meant “a distinct political society separated from others, capable of managing its own affairs and governing itself.” *Id.*; *see also* Cowan, *supra* note 4, at 94 (“[T]raditional concepts and mechanism[s] for avoiding double taxation that have developed in other multi-jurisdictional settings are not easily imported into Indian country.”).

268. Under the U.S. Constitution, Congress has the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause has been interpreted to have dormant, or negative, implications restricting state and local government powers. M. DAVID GELFAND, JOEL A. MINTZ & PETER W. SALSICH, JR., *STATE AND LOCAL TAXATION AND FINANCE IN A NUTSHELL* 20 (3d ed. 2007). The requirement that state taxes be “fairly apportioned” was articulated in *Complete Auto Transit, Inc. v. Brady*, in addition to the requirements that (1) “the tax is applied to an activity with a substantial nexus with the taxing State,” (2) “[it] does not discriminate against interstate commerce,” and (3) “[it] is fairly related to the services provided by the State.” 430 U.S. 274, 274, 279 (1977); *see also* GELFAND ET AL., *supra*, at 33–37 (discussing the *Complete Auto Transit* test). However, apportionment does not apply to individual income taxes. *See* HELLERSTEIN & HELLERSTEIN, *supra* note 207, ¶ 20.10. There is no constitutional prohibition on a state taxing a nonresident who earns income within the state. *See id.* To prevent overlapping taxation between the resident’s home state and the state where income is earned, states provide income tax credits for personal income taxes paid to the other state. *Id.* (“Every state with a broad-based personal income tax provides a credit for taxes that their residents pay to other states.”).

interstate business can be taxed.²⁶⁹ Apportionment ensures that each state may tax what fairly represents the income earned within that state's geographic jurisdiction.²⁷⁰

To be clear, applying the doctrine of fair apportionment would require a change in existing law—a significant hurdle to undo over 200 years' worth of jurisprudence.²⁷¹ The doctrine of apportionment does not apply to nonmember businesses earning income within and outside Indian Country.²⁷² Though no state has income tax credits for taxes paid on income earned in Indian Country, some states exempt sales by tribes from state sales taxes.²⁷³ Further research is needed to understand how those tools could apply between states and tribes if the scope of tribal sovereignty was expanded.

Apportionment could be a powerful tool to resolve juridical taxation impacting transactions where tribes are acting as partners. Multi-state businesses are already used to apportioning income among multiple states. Consequently, nonmember businesses doing business in Indian Country would most likely be able to account for their income within and without Indian Country with relative ease. Fair apportionment could provide consistent, certain tax consequences for nonmember businesses. Additionally, tribes could both attract investment and keep the much-needed revenue. Tax credits or similar mechanisms could be a powerful tool to resolve juridical taxation where a tribe is acting as a retailer, ensuring that juridical taxation does not force a tribe to choose between attracting consumers and tax revenue.

CONCLUSION

Tax revenue compacts between tribes and states have been regarded as a cooperative solution to juridical taxation in Indian Country. Compacting has provided parties with certainty and prevented litigation. However, compacts have not lived up to the promise of resolving juridical taxation in a way that ensures that tribes have adequate opportunities to grow their economies. Compacts are underutilized in transactions where a tribe acts as a partner,

269. GELFAND ET AL., *supra* note 268, at 33 (“In the context of the dormant commerce clause, fair apportionment refers to the extent which an interstate (or international) business can be taxed, by a particular state, on its nationwide (or worldwide) income. . . . A commonly used apportionment formula incorporates the relative proportion of payroll, property, and sales receipts of the company for its in-state operations compared to the total of these three factors for its business as a whole (worldwide, if it is a unitary business). For example, if the corporation does one percent of its ‘business,’ as computed by this multi-factor formula, within the taxing state, then one percent of its total income may be used in computing the state’s corporate income tax.”).

270. The explanation of apportionment is simplified for purposes of this Article. In reality, it is a complex doctrine. For a full explanation, see 1 JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, *STATE TAXATION: CONSTITUTIONAL LIMITATIONS AND CORPORATE INCOME AND FRANCHISE TAXES* ¶¶ 9.01–.16 (3d ed. 1998).

271. *See* Pomp, *supra* note 2, at 1216 (arguing that a “robust and invigorated Indian Commerce Clause” would surely have changed the outcome of the cases in the area of state taxation in Indian Country).

272. *See* *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 150–51, 150 n.26 (1982); *see also* COHEN, *supra* note 1, § 8.05.

273. *See* IDAHO CODE § 63-3622Z (2022) (exempting tribe or tribal enterprise sales within the reservation from state sales tax); N.C. GEN. STAT. ANN. § 105-164.13(25) (West 2022).

probably because states lack incentives to enter compacts that cover such transactions. Furthermore, compacts perpetuate a piecemeal tax landscape in Indian Country, having a distortive effect on and further hindering tribal economic growth.

Instead of sacrificing tribal sovereignty, an alternative to compacting could be a wholesale shift in law and policy to strengthen tribes' territorial sovereignty and prevent state taxation within Indian Country. This shift would solve juridical taxation and might provide more efficient opportunities for growing tribal economies. More research is needed in this area to explore the possibilities.