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Tribal Sovereignty, Sales Tax, and States Interference: Why Tax Compacts May Be the Best Way Forward

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Tribal Sovereignty, Sales Tax, and States Interference: Why Tax Compacts May Be the Best Way Forward

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Abstract

Tribes as sovereigns have the power of taxation. When states seek to impede this power by imposing their own taxes on non-member transactions on Reservations, Tribes must decide if imposing their own Tribal tax outweighs the risk of increased prices deterring business and business partnerships. This is the issue of double taxation. This Note investigates paths of remedy that address the burden of double taxation specific to sales taxes. Specifically, it looks at tax preemption, litigation, and policy. Preemption is difficult, and the existing case law framework on state tax preemption in Indian Country is complex, fact specific, and generally favors the state. Current federal policies fail to address this issue, and states are unlikely to preempt their own taxes without gaining something in return. Tribe-state tax compacts offer a compromise that releives some of the burden borne by Tribes, but also requires concessions. This Note argues that while imperfect, these tax compacts may be the best remedy to double taxation in Indian Country and offers suggestions for how these binding agreements between sovereigns can be used to enforce state respect for Tribal sovereignty.

† J.D. Candidate 2026, University of Minnesota Law School and the Managing & Research Editor of the *Minnesota Journal of Law & Inequality*, Vol. 44. I first want to thank my grandparents for their unfettered support of my education and for teaching me the joy that comes with a love for learning. To my parents and family, thank you for shaping me into the person I am today. To *all* my loved ones, thank you for grounding me in the strength of community throughout law school. To my legal mentors, thank you for exposing me to so many realms of the legal field, for teaching me that legal excellence does not come at the cost of creative problem solving, and for showing by example how to practice with integrity. Last but not least, I would like to thank everyone who has helped shape this Note, including my faculty advisor and my fellow journal editors and staffers. To the readers, my hope is that this Note serves as a concise and detailed resource illustrating potential paths of remedy. This Note should not be used to tell Indigenous tribes and nations what they should or should not do. Tribal sovereignty must always be respected.

Introduction

Federally recognized Indian tribes ("tribes")[1] retain the power to tax as an essential part of sovereignty.[2] Tax collection provides sovereigns with revenue to support the functioning of their government.[3] The possibilities of tax-based revenue sources for tribes are limited by the impracticality of tribal income tax and property taxes,[4] leaving tribes with sales tax and severance tax as feasible sources of tax revenue.[5]

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1. Indigenous people identify differently, for example as "Indigenous," "Native," "Indian," as is their right. This Note uses the term "Indian" consistent with Federal Indian law. The word "Tribe" will be capitalized when referencing a specific tribe and be uncapitalized when referring to tribes and tribal nations generally as a category of sovereigns. *See* FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.02 [2], (Nell Jessup Newton & Kevin K. Washburn eds., 2024) [hereinafter COHEN'S HANDBOOK] ("The term 'Indian tribe' has distinct and different meanings for Native people and for federal law . . . . [F]ederal law ordinarily uses the term 'Indian tribe' to designate a group of Native people with whom the federal government has established some kind of political relationship or 'recognition' . . . . [S]uch recognition do not always reflect tribal understandings.").

2. *See* RESTATEMENT OF THE LAW OF AMERICAN INDIANS § 21 (AM. LAW INST. 2024) ("(a) Indian tribes have the inherent power to tax income, property, and activities on Indian lands. (b) Tribal power to tax nonmembers on nonmember lands within Indian country is subject to separate limitations on the inherent power of tribes to regulate nonmembers."); COHEN'S HANDBOOK, *supra* note 1, § 10.04 [1] (citations omitted) ("Because the power to tax derives from a tribe's inherent sovereign powers, federal authorization of tribal taxes is not required . . . Congress in general has affirmed the tribal taxing power, as has the executive branch."); *see also* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982) ("The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management.").

3. U.S. TREASURY DEP'T ADVISORY COMM., TREASURY TRIBAL ADVISORY COMMITTEE: SUBCOMMITTEE ON DUAL TAXATION REPORT 4 (Dec. 9, 2020) (citation omitted) ("Every government relies on tax revenues to fund essential services and public goods, including building and maintaining infrastructure (such as roads, broadband, water and waste water systems); permitting and licensing businesses and professions; enforcing contracts and resolving disputes; ensuring public safety, educating children and workers; enforcing building codes and other safety measures; insuring against unemployment and worker injury; and more.").

4. *See* Pippa Browde, *Sacrificing Sovereignty: How Tribal-State Tax Compacts Impact Economic Development in Indian Country*, 74 HASTINGS L.J. 1, 12 (2022) [hereinafter *Sacrificing Sovereignty*] (first citing Tribal Governance: Taxation, NAT'L CONG. OF AM. INDIANS, https://www.ncai.org/policy-issues/tribal-governance/taxation [https://perma.cc/UR55-P6MF]; then citing 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); and then citing McCulloch v. Maryland, 17 U.S. 316, 316 (1819)) ("As a practical matter, tribes do not impose income tax, because they lack a sustainable tax base among their Members. 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."). *See generally* KELLY CROMAN & JONATHAN TAYLOR, WHY BEGGAR THY INDIAN NEIGHBOR: THE CASE FOR TRIBAL PRIMACY IN TAXATION IN INDIAN COUNTRY 7 (2016), https://www.bia.gov/sites/default/files/dup/assets/as-ia/raca/pdf/2016_Croman_why_beggar_thy_Indian_neighbor.pdf [https://perma.cc/HQ89-XAC9] (describing and arguing for fair solutions to the issues arising from states' attempts to assert primacy over tribal taxation powers).

5. *Sacrificing Sovereignty*, supra note 4, at 12–13; *see also* Mark J. Cowan, *Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal*

However, while a tribe's ability to impose a tax and benefit from that revenue is inherent in their taxing power, it can be, and has been, limited by state infringement.

The existing literature lays out a complex web of case law regarding tribal taxing power and contains an array of economic and policy arguments for why tribal taxing authority is important to Indigenous sovereignty. The current literature on tribe-state tax compacts generally focuses on specific taxes like cigarettes and fuel taxes or severance taxes.[6] By focusing on tribal sales tax of "tangible goods," this Note speaks directly to a niche of tribal tax that is often overlooked.

Generally, states may only tax non-member activity in Indian Country,[7] and cannot tax Members.[8] This means that states are able to collect revenue from economic activity within the boundaries of another sovereign. When the two taxing authorities overlap in Indian Country,[9] tribes are left with a hard decision: forego taxing non-member transactions and lose a revenue source, or carry the burden of double

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Government in Protecting Tribal Governmental Revenues, 2 PITT. TAX REV. 93, 103–04 (2005) [hereinafter *Double Taxation in Indian Country*] (discussing examples of how severance or consumption taxes may be used by tribes).

6. This Note refers to these tax agreements as "tribe-state tax agreements" or "tribe-state tax compacts;" however, "state-tribe" and "state-tribal" are also used when directly citing a source.

7. *See* RESTATEMENT OF THE LAW OF AMERICAN INDIANS PDF § 30 (AM. LAW INST. 2024) ("States may tax nonmember activities in Indian country, except when the state tax: (1) conflicts with an express federal statutory prohibition, (2) is impliedly preempted by federal law, or (3) infringes on tribal self-governance."); RESTATEMENT OF THE LAW OF AMERICAN INDIANS PDF § 32 (AM. LAW INST. 2024) ("State taxation of tribal members or Indian tribes in Indian country is barred unless federal law clearly authorizes the taxation."). For clarity, this Note uses the terms "Indian Country" and "Reservation" both to refer to land within the boundaries of a tribe's jurisdictional territory.

8. The term "non-members" refers to persons who are not enrolled Members of a given tribe. The term "non-member" is not capitalized as it can refer to what some case law and secondary sources refer to as a "non-Indian" (someone without any formal tribal affiliation), or a "non-member Indian" (someone who is an enrolled Member of a tribe different than the tribe where a given action occurs). The term "Member" refers to someone who is an enrolled Tribal Member of the tribe where an action occurs or put differently the tribe being discussed at hand. "Member" is capitalized as its legal relevance of membership status reflects a specific political-governmental affiliation.

9. *See* Stacy 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, 461 (2021) ("The only express definition of 'Indian country' provided by the Court was by reference to 18 U.S.C. § 1151 as including 'formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States.'"); 18 U.S.C. § 1151 (defining "Indian country" as "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.").

taxation for non-member activity.[10] State sales taxes limit tax revenue, impose tangible tax-related administrative burdens on a tribe, and can disincentivize outside businesses from partnering with a tribe or developing in Indian Country.[11] Meaning, that when states impose their own sales tax on non-member transactions in Indian Country, it can threaten tribal economic development.[12] However, tax agreements between a state and tribe are an avenue for mitigating these harms by making an explicit market space for the imposition of a tribal sales tax. These agreements often require that tribes share the sales tax revenue collected from sales tax on transactions in Indian Country with the state.[13] By cohesively assessing accessible tribe-state tax agreements, laying out existing case law, and addressing federal and state policy options, this Note will collect the major research components relevant to a sales tax dispute between a tribe and state, and make the argument for why tribe-state tax compacts may be the best way forward.

Part I breaks down the taxation jurisdiction relevant for a tribal "sales tax" on tangible goods. It inspects the current legal understanding of whether a tribe can impose a sales tax on non-member buyers in Indian Country[14] and summarizes the functions of a tribe-state tax compact. Part II provides an overview of the avenues tribes may take to remedy the burden of double taxation, through litigation to enjoin the application of state sales tax in Indian Country and through establishing a tribe-state tax compact (also referred to as "tax agreement"); it then touches on policy remedies.

This Note argues for the inclusion of certain provisions in tribe-state tax compacts, critiques the existing litigation avenues for remedying tribe-state tax disputes, and provides suggestions for policy and legislative actions that could help alleviate the issue of double taxation in Indian Country. By highlighting the issue of double taxation this Note

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10. *See Sacrificing Sovereignty*, *supra* note 4, at 13; CROWMAN & TAYLOR, *supra* note 4, at 3–4.

11. *See* Erik M. Jensen, *Taxation and Doing Business in Indian Country*, 60 ME. L. REV. 3, 57 (2008) ("For example, if the statute says that a sales tax is imposed on a product's purchaser, and an on-reservation purchaser is not an Indian, the tax is likely to be valid even if the Indian tribe bears the economic burden of the tax."); *see id.* at 91 (describing the potential deterrence of investors due to concern over tribal tax, how it may impact economic development, and how the notion of economic development, or specific kinds of economic development are not always desired by a tribe or tribal Members).

12. *See generally Sacrificing Sovereignty*, *supra* note 4, at 1 (examining broadly the limitations of such additional taxation on tribal economic development).

13. *See generally* Mark Cowan, *State-Tribal Tax Compacts: Stories Told and Untold*, POL'Y DISCUSSION PAPER SERIES (Ctr. for Indian Country Dev., Minneapolis, Minn.), Sept. 2021 (reviewing the background, takeaways, challenges, and shortcomings of these agreements).

14. This Note will not focus on the sales tax of liquor, cigarettes, oil, or gas. *See* COHEN'S HANDBOOK, *supra* note 1, § 10.04[1] ("The Supreme Court . . . has created certain limitations with respect to [tribal] taxation of nontribal members on nontribal lands.").

aims to inform legal professionals and bolster respect and recognition of tribal sovereignty.

I. Background

It is important to acknowledge the long history between tribal, state, and federal taxation.[15] The history of Federal Indian policy is often thought of in terms of eras. The Department of the Interior organizes this history into eight: the "Treaty-Making Era," the "Removal Era," the "Reservation System Era," the "Allotment and Assimilation Era," the "Reorganization Policy Era," the "Termination Era," the "Self-Determination Era," and the current era of "Self-Governance."[16] While all of this history is important to contextualize the ways in which the United States and states themselves have repeatedly tried to disenfranchise and strip tribes of their inherent rights as sovereigns, this Note will condense these eras to highlight the aspects of them most relevant to tribal sales tax.

The Removal and Allotment eras aimed to dismantle tribal sovereignty by enacting laws that broke up tribal territory and took tribal lands. The Indian Removal Act of 1830 "resulted in forced migrations by numerous tribes from the eastern United States."[17] Forced land secession were further advanced by the Federal Allotment Act of 1887 (the "Dawes Act"), which broke up tribally owned land by allotting the "acreage to individual Indians to own in fee simple."[18] Allotment often resulted in non-members gaining ownership of this land through sale.[19] Put simply,

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15. *See generally* COHEN'S HANDBOOK, *supra* note 1, § 10.01[2] (discussing the historical background of taxation in Indian Country); *see generally Sacrificing Sovereignty*, *supra* note 4 (discussing how the history of colonialism, Federal Indian policy and case law impact taxation in Indian Country).

16. U.S. DEP'T OF THE INTERIOR, *Federal Law and Indian Policy Overview*, https://www.bia.gov/bia/history/IndianLawPolicy [https://perma.cc/ZCW3-RVCM].

17. 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, 6 (2022) (citing Indian Removal Act, Pub. L. No. 21-148, ch. 148, 4 Stat. 411 (1830)).

18. *Id.* at 6 (citing General Allotment Act of 1887, Pub. L. No. 49-105, ch. 119, §1, 24 Stat. 388, 388, *repealed by* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-461 §§ 101–03, 114 Stat. 1991 (codified at 25 U.S.C. §§ 2201–2219 (2020)). For the purposes of this Note, the term "fee land" generally refers to land held in "fee simple" by a non-member. The term "fee simple" refers to complete ownership of a parcel of land. *See Fee*, BLACK'S LAW DICTIONARY (11th ed. 2019).

19. *Sacrificing Sovereignty*, *supra* note 4, at 10–11 (citing FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04 & nn.14–15, 25–31 (Nell Jessup Newton ed., 2017)) ("Within fifty years of allotment policy the amount of land was reduced to forty-eight million acres."); *see* COHEN'S HANDBOOK, *supra* note 1, § 2.08[3][b] (citations omitted) (discussing how the Burke Act of 1906 authorized the Secretary of Interior to unrestrict the fee simple patents distributed through allotment prior to the expiration of those parcel's trust period, meaning that the parcel were subject to state and federal tax, and could be seized to pay debts).

"[t]he effect of the Dawes Act was to diminish tribal sovereignty, erase reservation or Indian territory boundaries, and force assimilation."[20] Today, one of the consequences of the Dawes Act is felt in the presence of fee land throughout Indian Country, which (as will be discussed) helped open the door to state taxing authority of non-members in Indian Country.

The Indian Reorganization Act of 1934 ("IRA") briefly brought about a new era of federal recognition of tribes' sovereign powers and aimed to "restore tribal land to tribes and develop tribal economies."[21] However, the Termination Era quickly followed. Termination stripped many tribes of their sovereign status in order to end the United States' trust relationship with them, and "ultimately [to] subjugate Native American Indians to United States federal, state, and local laws."[22] The Termination Era ended federal programs that provided services to tribes and their Members, "including health, educational and welfare services, and amounted to widespread loss of land by tribes."[23] The removal of federal service programs also "allowed states to expand their civil and criminal jurisdiction within Indian Country."[24] Terminations and the cut of federal funding and services weakened tribes economically and "exacerbated poverty" in Indian Country.[25] This damage left many tribal communities without "sustainable tax base among their [M]embers,"[26] and can be seen as a causal factor behind tribal income tax impracticability. Moreover, tribes whose federal recognition was terminated by the United States government during this Era became prohibited from applying their own tribal tax laws.[27] Like the Dawes Act,

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20. Browde, *supra* note 17, at 6 (citing Cnty. of Yakima v. Confederated Tribes and Bands of the Yakima Nation, 502 U.S. 251, 254 (1992)).

21. *Id.* at 7 (citing Indian Reorganization (Wheeler-Howard) Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 5101–121)).

22. *Sacrificing Sovereignty*, *supra* note 4, at 10 (citing FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §1.06 & nn.19 (Nell Jessup Newton ed., 2017)); *see Bureau of Indian Affairs Records: Termination*, NATIONAL ARCHIVES, https://www.archives.gov/research/native-americans/bia/termination [https://perma.cc/G75R-NCQT].

23. Browde, *supra* note 17, at 7 (citing FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.06 (Nell Jessup Newton ed., 2012)).

24. *Id.* (citing FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.06 nn.1–33 (Nell Jessup Newton ed., 2012)).

25. See *Sacrificing Sovereignty*, *supra* note 4, at 10–11.

26. *Id.* at 12 (citing *Tribal Governance: Taxation*, NAT'L CONG. OF AM. INDIANS, https://www.ncai.org/policy-issues/tribal-governance/taxation [https://perma.cc/UR55-P6MF]) ("As a practical matter, tribes do not impose income tax, because they lack a sustainable tax base among their members.").

27. *Id.* at 10–11 (citing FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.06 & nn.24–25 (Nell Jessup Newton ed., 2017)).

termination effectively expanded state taxing authority, and thus helped pave the groundwork for today's issue of double taxation.[28]

The cornerstone "idea of the [S]elf-[D]etermination policy is that tribes should be 'the primary or basic governmental unit of Indian policy.'"[29] In an effort to promote tribal sovereignty, programs of this Era shifted from being managed by the Bureau of Indian Affairs ("BIA") to being managed "at the tribal level."[30] One example of such efforts is the establishment of the National Congress of American Indians "to help promote tribes' ability to develop their 'own programs' and 'solve their own problems.'"[31] However, the question remains: how does a tribe develop "their own programs" when their ability to raise sustainable revenue through taxation is narrowed by past policy's expansion of state and federal jurisdiction over their sovereignty? Thus, while these policies are a step in the right direction, it is important to contextualize this positive shift in Federal Indian policy as policies that function concurrently with the legacy of the Removal, Allotment, and Termination Eras.[32]

A. Tribal Taxing Power Overview

Tribes retain the power of taxation as a "core aspect of tribal sovereignty."[33] Taxing power provides a sovereign with control and

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28. *Id.*

29. *Id.* at 12 (citing FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.07 & nn.3–4 (Nell Jessup Newton ed., 2017)); *see also* Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. § 5361–5368.); *see also* Tribal Self-Governance Act of 1994, Pub. L. No. 103-413, tit. III, 108 Stat. 4250 (1994) (codified as amended at 25 U.S.C. § 450a note and § 458aa et seq.).

30. *Sacrificing Sovereignty, supra* note 4, at 11–12 (citing FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.07 & nn. 81–82 (Nell Jessup Newton ed., 2017)); *see also* STEPHEN PEVAR, THE RIGHTS OF INDIANS AND TRIBES 252 (Oxford Univ. Press, 5th ed. 2024) (1983) (discussing Congress's 1982 enactment of the Indian Tribal Government Tax Status Act, which explicitly exempted Tribes from most of the taxes that states were exempt from, and the subsequent IRS regulations adopting its position that "tribal income [was] not subject to federal income taxation"); 26 U.S.C. § 7871 (codifying the Indian Tribal Government Tax Status Act).

31. *Sacrificing Sovereignty*, *supra* note 4, at 11 (citing FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04 & n.13 (Nell Jessup Newton ed., 2017)).

32. *See id.* (citing FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.07 & nn.81–82 (Nell Jessup Newton ed., 2017)) ("Specifically in the economic development arena, where land and inheritance issues are complicated by the ownership of land by non-Indians.").

33. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982) (noting taxation is a foundational instrument of "self-government and territorial management," as it establishes and maintains revenue sources for essential governmental services); *id.* at 144 (stating thatexplaining how a tribe's taxing power also can derive from their power to exclude as it "necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct, such as a tax on business activities conducted on the reservation."). *See generally* COHEN'S HANDBOOK, *supra* note 1, § 10.04[1] (discussing tribal

finances governmental services necessary for self-governance.[34] There are two main factors to consider regarding a tribe's taxing authority: membership status, and whether the tax occurs in Indian Country. Tribes can impose a sales tax on Member transactions in Indian Country,[35] and states cannot.[36] Tribal taxing authority over non-members in Indian Country "has long been recognized as a core aspect of tribal sovereignty" by both Congress and the executive branch, but has been constrained by Supreme Court decisions.[37] Taxing authority is further complicated by a state's often concurrent ability to collect sales tax from non-member transactions that occur in Indian Country.[38] So whose taxing authority applies to non-member activity in Indian Country? It depends. Generally, the answer hinges on who is burdened by the "legal incidence of a tax."[39]

The "legal incidence of a tax" refers to the person or entity on which the tax burden falls.[40] Put differently, it is an administrative burden that "falls on the party" required by statute "to actually file a tax return and remit the tax to the government."[41] Legal incidence of a tax is different than the economic incidence of tax, where the bearer of the economic incidence of a tax is the person or entity who actually pays the tax and is economically worse off because of it.[42] Because this Note focuses on sales tax—which places the legal incidence on the purchaser—the issue of legal

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authority to tax).

34. CROMAN & TAYLOR, *supra* note 4, at 1 (referencing *Merrion*, 455 U.S. 130).

35. *See Merrion*, 455 U.S. at 140–41.

36. *See generally* Leeds & Beard, *supra* note 9, at 461; *see also* Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 453 (1995).

37. COHEN'S HANDBOOK, *supra* note 1, § 10.04[2][b] (citations omitted); *see also id.* ("But in *Montana v. United States*, the Court held that absent treaty or statutory provisions to the contrary, tribes have no inherent authority to regulate non-Indians on non-Indian fee land within reservation boundaries" absent certain exceptions being met, tribal taxing authority had not been divested by the branches of the United States government); *see* Montana v. United States, 450 U.S. 544, 565 (1981); *see also* PEVAR, *supra* note 30, at 264 (citing Washington v. Confederated Tribes of Colville Indian Rsrv., 477 U.S. 134, 151–53 (1980)) ("[I]n 1980, the Court held that non-Indians can be required to pay a tribal sales tax when they buy goods from Indian vendors on tribal land."); Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1204 (2010).

38. *See Confederated Tribes of Colville*, 477 U.S. at 160.

39. *Sacrificing Sovereignty*, *supra* note 4, at 16; *see Okla. Tax Comm'n*, 515 U.S. at 458 ("The initial and frequently dispositive question in Indian tax cases . . . is who bears the legal incidence of a tax."); *see* Williams v. Lee, 358 U.S. 217 (1959) (defining the infringement on tribal sovereignty test); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (defining the preemption balancing test).

40. Cowan, *supra* note 13, at 7 (citing Richard Westin, WG&L TAX DICTIONARY 345 (2000)); *see also* Confederated Tribes & Bands of the Yakama Indian Nation v. Gregoire, 658 F.3d 1078, 1084 (9th Cir. 2011).

41. Cowan, *supra* note 13, at 7.

42. *Id.*

incidence boils down to whether the purchaser of a good in Indian Country is a Member of the tribe where the good was purchased.[43]

If the purchaser of a good is a Member state sales tax will not apply; it may only apply if the purchaser is a non-member. This is because when a state imposes a tax in Indian Country whose legal incidence "falls on a tribe or its [M]embers," the tax is generally void "absent a federal statute permitting such taxation."[44] If the legal incidence of a state tax falls on a non-member, the state may generally impose the tax even if the economic activity happens within Indian Country.[45] However, if said state tax is "preempted by federal law, or if it interferes with a tribe's ability to exercise its sovereign functions, it *does not* apply to non-Indians in Indian [C]ountry."[46]

Other possible constraints of a tribe's authority to impose a sales tax on non-members are extremely narrow applications of federal statutes,[47] including a possible requirement to have tax related tribal legislations approved by the Secretary of the Interior.[48] Despite these constraints, tribes have the power to impose a sales tax on non-member transactions

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43. *See The Burden of Sales and Excise Taxes*, BRITANNICA MONEY, https://www.britannica.com/money/sales-tax/The-burden-of-sales-and-excise-taxes [https://perma.cc/D8VC-AEVW]. *See generally* Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005); Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9 (1985).

44. *Sacrificing Sovereignty*, *supra* note 4, at 16; *see also Okla. Tax Comm'n*, 515 U.S. at 458; Bryan v. Itasca Cnty., 426 U.S. 373, 392 (1976) (citing Oklahoma Tax Comm'n v. United States, 319 U.S. 598, 613–614 (1943) (Murphy, J., dissenting)) ("This is so because . . . Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate [a tax] immunity and allow states to treat Indians as part of the general community.").

45. *See* CROMAN & TAYLOR, supra note 4, at 7 (citing Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450, 459 (1995)).

46. *Id.* at 7 (first citing Ramah Navajo Sch. Bd. v. Bureau of Revenue of N.M., 458 U.S. 832, 837 (1982); and then citing White Mountain Apache Tribe v. Bracker, 488 U.S. 136, 142 (1980)) (emphasis in original).

47. *See* COHEN'S HANDBOOK, *supra* note 1, § 10.04[2][c] (citing 25 U.S.C. § 1302(a)(5), (a)(8)) (explaining that the Indian Civil Rights Act ("ICRA") provisions "most relevant to tribal taxing authority are the requirements that tribes pay just compensation for taking of property and that tribes not deny any person due process or equal protection of the laws."); *id.* (citing U.S. CONST., art. I, § 8, cl. 3) ("The federal constitutional commerce clause, which gives Congress the power to 'regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes,' is another potential source of constitutional limitation on the tribal taxing power."); *id.* at § 10.04[2][d] (citing 25 U.S.C. §§ 261–264) ("The Indian trader statutes are another potential source of limitation of the tribal taxing power."); *id.* (first citing 25 U.S.C. § 177; then citing *id.* at § 18.03[2]) ("The federal restraint on alienation of Indian trust property is a potential source of limitation on the tribal power to tax.").

48. *See* COHEN'S HANDBOOK, *supra* note 1, § 10.04[2][d] (citations omitted) ("Some tribal constitutions adopted under the [Indian Reorganization Act] require approval by the Secretary of the Interior for all or some tribal legislation. Others require secretarial approval only for tribal taxes on nonmembers."); *see also* 25 U.S.C. §§ 5109, 5124 (relevant reclassified sections of the Indian Reorganization Act of 1934).

in Indian Country.[49] To assess the regulatory authority of a tribe to impose a tribal sales tax on non-members, and when that authority overlaps with a state's taxation authority, courts look to the facts of each case.[50]

B. Tribal authority to impose a sales tax on non-members in Indian Country depends on the land ownership of where the tax occurs.

Merrion v. Jicarilla Apache Tribe held that a Tribe has the power to tax non-members on Tribally owned land.[51] The Court complicates this in *Atkinson Trading Co. v. Shirley* and *Nevada v. Hicks* by constraining a Tribe's power to tax non-member activity in Indian Country.[52] *Atkinson*'s opinion is applicable to taxation that occurs on non-member fee land, whereas in *Hicks* the relevant land was an allotment parcel held in trust for a Member. To understand the limitations of tribal taxing power over non-member transactions conducted in Indian Country, it is necessary to appreciate the constraints of *Atkinson* and *Hicks*.

The *Atkinson* and *Hicks* Courts' narrow readings of *Montana v. United States*[53] also limit the two *Montana* exceptions to the general

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49. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141–42 (1982) ("[A] tribe has the power to tax nonmembers only to the extent the nonmember enjoys the privilege of trade or other activity on the reservation to which the tribe can attach a tax.").

50. *See* CROMAN & TAYLOR, *supra* note 4, at 6 (quoting Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 TAX L. 897, 1220–21 (2010) (citations omitted) ("Case-by-case adjudication by a court is a notoriously difficult way of imposing order and coherence on a body of doctrine . . . The Supreme Court has not distinguished itself [in the area of Indian tax law], mischaracterizing the tax before it, abusing precedent, lapsing into *ipse dixit* reasoning, misreading or ignoring history, and retreating into formalism.").

51. Merrion, 455 U.S. at 141–42 ("[A] tribe has the power to tax nonmembers only to the extent the nonmember enjoys the privilege of trade or other activity on the reservation to which the tribe can attach a tax.").

52. *See generally* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 647 (2001) (the land at issue in *Atkinson* is non-member fee land); Nevada v. Hicks, 533 U.S. 353, 371 (2001) (the land at issue in *Hicks* was Tribal Land the case's limitation on tribal taxing authority over non-members is understood to be applicable to non-member fee land as tribal taxing authority is strongest when the action occurs on tribal land). It is important to note that both *Atkinson* and *Hicks* are Supreme Court decisions made during the Federal Indian policy era of "Self-Governance." *See* U.S. DEP'T OF THE INTERIOR, *Federal Law and Indian Policy Overview*, https://www.bia.gov/bia/history/IndianLawPolicy [https://perma.cc/ZCW3-RVCM]. This illustrates that even when Federal Indian policy is facially "progressive" tribal sovereignty is still subject to attack by the United States government.

53. *See* Montana v. United States, 450 U.S. 544, 565 (1981) (outlining the first *Montana*

court-made rule that "tribes lack regulatory authority over [non-members] on non-Indian fee land within [a] [R]eservation."[54] For a tribal sales tax on non-members to withstand the *Atkinson* and *Hicks* holdings, a tribe must either 1) establish an consensual private relationship between the non-member and the tribe with a nexus to the claim,[55] or 2) show that an individual's tax directly imperils the tribe's economic security, political integrity, or general health and welfare.[56]

Even when constrained by *Atkinson* and *Hicks*, *Montana's* first prong is satisfied in the context of a tribal sales tax applied to a purchase from a tribally owned store. This is because an explicit contractual relationship between the purchaser and tribe is established through the offer and acceptance of buying the good. However, this relationship between the non-member and tribe is not so clearly met if the owner of that store is not a tribe, or tribal Member. When a non-member purchases a good from a store owned by a non-member in Indian Country, the purchaser has a contractual relationship with the non-member store owner not with the tribe whose jurisdiction the store is located within.[57] In these cases a tribe must look to the second *Montana* exception to assert their tax. *Atkinson* requires courts to focus on the direct effect of non-member's actions when assessing the second *Montana* exception.[58]

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exception as a Tribe's ability to "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."); *id.* at 566 (outlining the second *Montana* exception as a Tribe's "retain[ed] inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.").

54. *Montana v. U.S.*, U.S. DEP'T OF JUST., https://www.justice.gov/enrd/indian-resources-section/montana-v-us [https://perma.cc/6WVD-K62U]; *see* Montana v. United States, 450 U.S. 544 (1981); *Atkinson*, 532 U.S. 654, 656. "Reservation" is capitalized because it holds political and legal meaning, as refers to the boundaries of a sovereign government.

55. *See* Atkinson, 532 U.S. at 656 (holding that "Montana's consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself[,]" is understood to stand for requiring an explicit contractual relationship to satisfy the "consensual relationship" referenced in *Montana*); *see also Hicks*, 533 U.S. at 371 (limiting the consensual relationship between the Tribe and non-member be private and not government-to-government). While the land at issue in *Hicks* was Tribal Land, this limitation remains in place regardless of land ownership.

56. *See Atkinson*, 532 U.S. at 656–57 (focusing the direct effect on the individual non-member's threat or impairment on the Tribe's sovereign functioning).

57. *See id*. at 655 (citing *Montana*, 450 U.S. at 565) ("The consensual relationship must stem from 'commercial dealing, contracts, leases, or other arrangements' . . . and a nonmember's actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection."); *see id.* at 656 ("*Montana's* consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself.").

58. *See id*. at 657.

So how would a non-member purchase directly effect a tribe? A logical answer is that that the ability to tax non-member transactions in Indian Country regardless of retailer ownership directly effects a tribe's ability to generate revenue for governmental services like police and fire departments or emergency medical services. Unfortunately, the Court has not given this logic much weight. Meaning, that in Indian Country tribes have the power to tax non-members on tribal land,[59] but that this generally does not "extend to businesses run by non-Indians on" non-member fee simple land.[60]

The constraints of the *Montana* exceptions highlight the importance of whether or not a tribe is a retailer in assessing sales tax jurisdiction in Indian Country. A tribe is considered a "retailer" in cases where a non-member "purchase[s] goods or services from tribes or tribal enterprises within Indian Country."[61] In these situations, state sales tax may be imposed on the non-member customer,[62] as courts have held that allowing tribes to omit state sales tax when selling goods on-Reservation to non-members would create an unfair market advantage.[63] A tribe may also be considered a retailer when they function as a "partner" by engaging "in commercial transaction with non-Indian businesses or investors in Indian Country."[64] Even when a tribe functions as a partner, the state may still "assert various business taxes, including income or business-operation taxes, on the non-Indian businesses."[65] In short,

59. *See* Washington v. Confederated Tribes of the Colville Indian Rsrv., 447 U.S. 134, 153 (1980) ("Federal courts also have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity.").

60. *Sacrificing Sovereignty*, *supra* note 4, at 15–16 (citing *Atkinson*, 532 U.S. at 653, 659).

61. *Id*. at 14.

62. *Id.*

63. *See* PEVAR, *supra* note 30, at 257 (first citing Washington v. Confederated Tribes of the Colville Indian Rsrv., 477 U.S. 134, 151 n.27 (1980); and then citing Confederated Tribes & Bands of the Yakima Indian Nation v. Gregoire, 658 F.3d 1078, 1087 to 1088(9th Cir. 2011)) ("[Tribes] are not entitled to such an 'artificial' advantage when they sell products imported from outside the reservation to non-Indians."); *see also Sacrificing Sovereignty*, *supra* note 4, at 19 (citation omitted) ("[W]ith 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."). This judicial reasoning, however, doesn't seem to apply to other domestic sovereigns such as states. For example, Minnesota has no sales tax on clothing, and this incentivizes customers to come to the state to benefit from that lower cost of goods. Minnesota's taxing scheme also increases economic activity at commercial places like the Mall of America. Imagine a Wisconsin resident drives an hour to the Mall of America to buy back to school clothes for their child. It would be inconceivable for them to be charged a Wisconsin sales tax. Understanding that the boundaries of two states differ from the boundaries of a reservation that is entirely within the borders of a single state, all these boundaries are fundamentally between two sovereign governments and should be treated as such.

64. *Sacrificing Sovereignty*, *supra* note 4, at 14.

65. *Id.* (the use of the permissive word "may" indicates that the ability of a state to impose taxes when a tribe is a partner is only possible, not a given). It is easier to predict

generally when a tribe is a retailer or a partner, both the tribal and state sales taxes may be imposed on the non-member customer.[66] This overlap in taxation authority of non-member transactions in Indian Country results in the issue of double taxation.

C. A tribe's limited remedy for double taxation through litigation rests on unclear and ineffective balancing tests.

When faced with the burden of double taxation, a tribe's remedial options are generally forgo imposing their own tax, limit their own tax, enter a tax agreement with a state, or fight to have the state's tax invalidated in court. The Supreme Court has invalidated state taxes issued on non-member activity in Indian Country through balancing tests.[67]

In *White Mountain Apache Tribe v. Bracker,* the Supreme Court of the United States invalidated a state "motor carrier license tax" and "use fuel tax" that "applied to a nonmember logging company doing business on the [R]eservation."[68] The *Bracker* Court's analysis in determining the validity of the state tax is the most common judicial approach to this kind of issue. First, the Court looked to see if Congress had clearly expressed a federal preemption of the state tax, and held that they did not.[69] The Court then turned to the facts of the case to balance the weight of the State's interest on one hand, and the interests of the Tribe and federal government on the other—this became known as the *Bracker* balancing test.[70] The Court found that there was a strong federal interest in the issue at hand, as federal law had established an overarching regulatory scheme for the harvest and sale of timber on the Apache Reservation.[71] The Court also concluded that the State's interest was merely to raise revenue.[72] For these main reasons, the *Bracker* Court held that the State tax was invalid because the State's interest in raising revenue was not sufficient to

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the likelihood of a court upholding a state tax imposed on non-members in Indian Country when a tribe is a retailer compared to when a tribe is acting as "partner." *See Id.* at 19–20.

66. *Id.* at 14.

67. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue, 458 U.S. 832 (1982).

68. Richard 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, 516–17 (1999); see *Bracker*, 448 U.S. 136.

69. *Bracker*, 448 U.S. at 143–44.

70. *See id.*; *Sacrificing Sovereignty*, *supra* note 4, at 18.

71. *Bracker*, 448 U.S. at 145–49.

72. *Id.* at 150 ("They refer to a general desire to raise revenue, but we are unable to discern a responsibility or service that justifies the assertion of taxes imposed for on-reservation operations conducted solely on tribal and Bureau of Indian Affairs roads.").

constitute an interest[73] and that allowing the tax would disrupt the federal regulatory scheme.[74]

Two years later in *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, the Court "invalidated a state's gross receipts tax" that applied to a non-member contractor who was "hired by a Tribal school board to construct a school for Indian children on the Tribe's [R]eservation."[75] The *Ramaha Navajo School Board* Court also rooted their opinion in the facts, holding that the state had failed to assert a legitimate regulatory interest that would justify their taxation.[76] However, the Court quickly shifted to a pattern of upholding state taxes.

In *Cotton Petroleum Corp. v. New Mexico*, the Supreme Court upheld a State tax on a non-member company's profits "made from selling an Indian [T]ribe's oil and gas which the company had extracted from [T]ribal [L]ands pursuant to a contract with the [T]ribe."[77] Despite the extensive federal regulation of the petroleum industry,[78] the *Cotton Petroleum* Court held that there was no federal regulatory scheme that preempted the State tax.[79] This leaves the question, what exactly is a sufficient tribal or federal regulatory interest to preempt state tax? Case law offers no clear answer.

What we do know is that when determining a state's ability to impose a tax on non-members in Indian Country courts generally use the *Bracker* balancing test.[80] Under the *Bracker* test, state "taxes that impact only non-Indians—including income, personal property, real estate, and sales taxes—typically are valid."[81] However state taxes on non-members can be considered invalid, when "the state is attempting to tax the income earned by a non-Indian for providing goods or services to an Indian tribe (or to its [M]embers)."[82] For cases who's facts do not overlap with these guide posts, a court will look to:

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73. *Id.* at 150–51.

74. *Id.* at 152.

75. Ansson, Jr., *supra* note 68, at 518; *see* Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue, 458 U.S. 832 (1982); *Bracker*, 448 U.S. 136.

76. *Ramah Navajo Sch. Bd.*, 458 U.S. at 840–44.

77. PEVAR, *supra* note 30, at 262; *see* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).

78. *Cotton Petroleum*, 490 U.S. at 177–78.

79. *Id.* at 186–87.

80. PEVAR, *supra* note 30, at 261.

81. *Id.* (first citing Thomas v. Gay, 169 U.S. 264 (1898) (personal property tax); then citing Agua Caliente Band of Cahuilla Indians v. Riverside County, 2017 WL 4533698 (C.D. Cal. 2017), aff 'd, 749 Fed. Appx. 650 (9th Cir. 2019) (tax on the value of a lease of tribal land); Utah & No. Ry. v. Fisher, 116 U.S. 28 (1885) (real estate tax); then citing Loveness v. Arizona Dept. of Revenue, 963 P.2d 303 (Ariz. App. 1998), cert. denied, 525 U.S. 1178 (1999) (income tax); and then citing Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 459 (1995)).

82. *Id.*; *see also id.* at 263 ("[A]ny tax on non-Indians for providing goods or services to

(1) Whether "the activity in question was already subject to substantial federal regulation."[83]

(2) Whether the burden of paying the state tax "would ultimately fall on the tribe or its [M]embers," including if it fell on a non-member business who would subsequently raise their prices "by an amount equal to the tax," which would then be paid by Members.[84]

(3) Whether the state was providing few if any services relevant to the taxes it "sought to collect."[85]

These factors show how the balancing test to determine the legality or validity of a state tax on non-member activity in Indian Country is significantly fact dependent.

The interests present in the balancing test become more difficult to parse out when a tribe is acting as a partner-retailer, as the lines between tribal and non-member interest and involvement can blur.[86] When a state tax is not invalidated this can impact a non-member business's desire to partner with a tribe, "given that they can be taxed by both the state and the tribal entity."[87] Thus, the potential for double taxation not only limits a tribal revenue source, it also has negative effects on the likelihood of non-members entering into business partner relationships with tribes.[88] This diminishment of tribal and non-member business partnerships

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a tribe will harm the tribe's ability to be economically self-sufficient and is inherently inconsistent with the federal policy of fostering tribal self-sufficiency.").

83. *Id.* at 262; *see also* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151–53 (1980).

84. PEVAR, *supra* note 30, at 262 ("[A] company building a tribal school will charge the tribe more money to build the school if it has to pay state taxes, and similarly, a company harvesting tribal timber for resale will pay the tribe less for its timber if the transaction is subject to state taxation. Therefore, it would be the *tribe* paying the tax, and courts have invalidated state taxes in such situations.").

85. *Id.* ("In each case [where a state tax is invalidated], the state was merely 'revenue raising' at the tribe's expense.").

86. *See Sacrificing Sovereignty*, *supra* note 4, at 18–20.

87. *Id.* at 20; *see also id.* at 5 (first citing 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); and then citing Adam Crepelle, *How Federal Indian Law Prevents Business Development in Indian Country*, 23 U. PA. J. BUS. L. 638, 691–92 (2021)) ("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.").

88. *See id.* at 20 (citation omitted) ("[W]here 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."); *see also* Adam Crepelle, *How Federal Indian Law Prevents Business Development in Indian Country*, 23 U. PA. J. BUS. L. 683, 725 (2021) ("State taxes absolutely kill private investment in Indian Country."); PEVAR, *supra* note 30, at 263 ("Non-Indians will be discouraged from engaging in commercial transactions with Indian tribes, and when they do work with them will likely charge tribes a higher fee if their transactions are subject to state taxation.").

ultimately can have a negative impact on a tribe's economic development.[89]

D. Tribe-state sales tax agreements as an avenue to avoid double-taxation.

Tax compacts between a state and a tribe can be used to lighten the burden of double taxation of non-member transactions in Indian Country. A compact between a state and a tribe is a working agreement that creates a binding relationship similar to a contract. However, unlike a contract, a compact agreement also "resolve[s] jurisdictional or substantive disputes and recognize[s] each entity's sovereignty."[90] Compacts make visible tribes' sovereign status, as they inherently "represent [] that the transacting parties are sovereign entities, engaging in intergovernmental agreements."[91] However, negotiating a compact's terms with the state also require some concession of control.[92]

Tribe-state tax agreements are a subset of compacts that can touch on a wide variety of taxes, sales tax being just one of them. Of the tribe-state tax compacts publicly available, there are relatively few that include sales tax agreements.[93] Gaining access to these compacts is difficult, as there is "no comprehensive database of state-tribal tax compacts," and those that are available may only provide researchers with a summary of the agreement rather than the compact's actual text.[94] To discern key components of a tribe-state sales tax agreement it is helpful to look at both tribe-state tax agreements at large, and specifically tribe-state tax agreements that include sales tax such as those of Minnesota and Michigan.[95]

Generally, before a tribe-state compact is created a state's legislature must enact legislation "that specifically allows state actors to negotiate and compact with tribes."[96] For example, in Minnesota the

89. U.S. TREASURY DEP'T ADVISORY COMM., TREASURY TRIBAL ADVISORY COMMITTEE: SUBCOMMITTEE ON DUAL TAXATION REPORT 2 (Dec. 9, 2020) ("With the outside state and local government taxes setting the tax rate floor, Tribal governments are deprived of the ability to use tax policy to attract businesses to their lands in the manner available to all other governments seeking to grow their economies to support their citizens.").

90. *Sacrificing Sovereignty*, *supra* note 4, at 21 (citation omitted).

91. *Id.* (citation omitted).

92. *Id.*

93. *See* Cowan, *supra* note 13, at 12 (describing the relative difficulty of finding and reviewing many tribal-state tax compacts).

94. *Id.*

95. *Id.* at 26 ("[I]t is difficult to find agreements . . . that embrace sales taxes.").

96. *Sacrificing Sovereignty*, *supra* note 4, at 21 (citing David Getches, *Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding Self-Government*, 1 REV. CONST. STUD. 120, 147 (1993); *see also id.* at 21–22 (citations omitted) ("These statutes come in various forms, including statements of policy

"commissioner [on behalf of the Department of Revenue] is authorized to enter into a tax refund agreement with the governing body of any federally recognized Indian Tribe in Minnesota."[97] And in Michigan the "state treasurer, or [their] authorized representative, [may] on behalf of the department" enter into such agreements with a "federally recognized Indian tribe within the state of Michigan."[98] Both Minnesota's and Michigan's enabling statutes also include explicit language enabling sales tax to be part of any potential tribe-state tax compacts.[99]

Many tribe-state tax compacts have what Pippa Browde refers to as "non-substantive provisions" that are "similar to other intergovernmental agreements not specific to tax," and tax specific "substantive provisions that resolve or address juridical taxation, tax enforcement, or both between sovereigns."[100] Non-substantive provisions include basic information like identifying parties and defining terms.[101] They also generally include reference to state legislation that enables state-actors the authority to enter the compact, and relevant state and tribal law.[102] Non-substantive provisions also "provide for administrative issues such as enforcement, termination, and dispute resolution,"[103] and "usually articulate the goal or purpose of the intergovernmental agreement, which is often to resolve the potential consequences of juridical taxation."[104]

'encouraging cooperation,' such as in Montana and Nebraska. Other such laws grant specific authority to negotiate certain types of taxes, such as cigarette or other excise taxes. Still other statutes approve and incorporate tax compacts with tribes as a matter of state statutory law."); MINN. STAT. § 270C.19, Subd. 2(a) (2024) (granting authority to the department of revenue to engage in compact negotiation with federally recognized tribes); MICH. COMP. LAWS § 205.30c (2013) (granting authority to the department of revenue to engage in compact negotiation with federally recognized tribes).

97. MINN. STAT. § 270C.19, Subd. 1(a) (2024).

98. MICH. COMP. LAWS § 205.30c(a) (2013).

99. *See* MICH. COMP. LAWS § 205.30c (12)(c)(i) (2013) ("[P]rovisions of a tribal agreement must include [c]ollection of taxes levied under the general sales tax act . . . on the sale of tangible personal property or the storage, use, or consumption of tangible personal property not exempt under the agreement."); MINN. STAT. § 270C.19, Subd. 2(a) (2024) ("The commissioner is authorized to enter into a tax agreement with the governing body of any federally recognized Indian Tribe in Minnesota, that provides for the state and the Tribal government to share sales, use, and excise tax revenues generated from on-reservation activities of non-Tribal members and off-reservation activities of Tribal members.").

100. *Sacrificing Sovereignty*, *supra* note 4, at 23.

101. *Id.* at 23–24 (citations omitted) ("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."); *see id.* at 25 (citation omitted) ("The definition of terms usually specifies the geographic location over which the tribe and state both assert taxing authority.").

102. *Id.* at 24 (citation omitted) ("Compacts provide the authority the state has to enter the agreement.").

103. *Id.* at 23–24 (citations omitted).

104. *Id.* at 24 (citations omitted). Juridical taxation simply refers to a

In tribe-state tax compacts, the type of tax or taxes "subject to the agreement" are plainly stated.[105] In identifying which kinds of taxes are subject to the compact, many compacts explicitly narrow the agreement's applicability only to a portion "of transactions for which states have actual or potential taxing authority."[106] Tribe-state tax compact substantive provisions "depend on whether the agreement addresses juridical taxation or tax enforcement and administration issues."[107] Substantive provisions may include setting an applicable tax rate, minimum tax rate, establishing tax revenue sharing portions, establishing which sovereign funds governmental services (which services these will be), and addressing tax administration issues.[108]

Some of the most important components in a tribe-state tax compact are the provisions that address the issue of double taxation.[109] By specifying the applicable taxes and rates for economic activity in Indian Country, the harm of double taxation may be minimized.[110] One way double taxation is addressed is to have a single sales tax rate apply to transactions in Indian Country.[111] Alternatively, some tribe-state tax compacts set 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."[112]

Revenue sharing provisions in tribe-state tax compacts detail how the tax revenue will be allocated between the sovereigns. Unsurprisingly, revenue sharing provisions in tribe-state tax compacts vary based on who is being taxed and what taxes are being collected. There are "all-or-nothing propositions," percentage-based sharing provisions, "per capita" allocation, and other revenue allocations based on more complex

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sovereign/government's authority to tax an individual.

105. *Id.* (citations omitted).

106. *Id.* at 24 (citations omitted).

107. *Id.* at 25.

108. *See id.* at 25–30.

109. *See, e.g.*, *id.* at 5 (citations omitted).

110. *See generally id.* at 25–26 (outlining various ways to balance specific state and tribal tax rates to produce a uniform taxable amount).

111. *Id.* at 25–26 (citations omitted) ("[I]f 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 rate of taxation over a transaction, allowing the state tax to override tribal taxation of the transaction. 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. Third, a compact can create a combination of lower state and tribal taxes to equal the agreed amount.").

112. *Id.* at 26 (citing DOUGLAS B.L. ENDRESON, RESOLVING TRIBAL-STATE TAX CONFLICTS 16 (1991)); *see also id.* ("If a tribe does not 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.").

formulas.[113] For example in Michigan's tribe-state tax compacts, the allocation of sales tax revenues are expressly set by percentages "between the compacting tribe and state."[114] These percentages depend "on the annual gross receipts of sales, and whether the tribe itself has its own sales tax or is just enforcing the state tax."[115] A case study of Minnesota's tribe-state tax agreements highlight the use of per-capita refunds and splitting tax revenue for Member and non-member sales tax in half between the state and the respective tribe.[116] Tribe-state tax compacts may also contain provisions that limit a tribe's spending of said tax revenue—these can be specific, or as broad as "essential governmental service" spending delegations.[117]

Administrative provisions are important for tribe-state tax agreements because they flesh out the practicalities of imposing a tax. Administrative provisions may include "issues such as recordkeeping, remittance and payment, auditing, and enforcing noncompliance," all of which are especially important details because of the parties' sovereignty.[118] Tribe-state tax compacts that include sales or retail tax will often explicitly address "who bears the legal obligation" for the taxes imposed on non-member transactions in Indian Country.[119] Some tribe-state tax compacts require the state to take on administrative responsibilities, including enforcement.[120] Other tribe-state tax compacts

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113. *Id.* at 26–27 (citations omitted).

114. *Id.* at 26 (citing TAX AGREEMENT BETWEEN THE BAY MILLS INDIAN COMMUNITY AND THE STATE OF MICHIGAN § III(B), Dec. 20, 2002).

115. *Id.* at 26 (citation omitted).

116. *See* Cynthia Bauerly, *Tax Agreements Between the State of Minnesota and Tribal Governments: A Case Study*, POL'Y DISCUSSION PAPER SERIES (Ctr. for Indian Country Dev., Minneapolis, Minn.), Nov. 2021, at 7–8.

117. *Sacrificing Sovereignty*, *supra* note 4, at 28 (citations omitted).

118. *Id.* at 28; *see also id.* ("The administrative provisions in tax compacts allow states to avoid tribal sovereign immunity enforcing the terms of the tax agreement.").

119. *Id.* at 28 (citing FUEL TAX AGREEMENT BETWEEN THE PYRAMID LAKE PAIUTE TRIBE AND THE STATE OF NEVADA § 3.9.2, Apr. 5, 2002); *see id.* at 28–29 (citing INTERGOVERNMENTAL AGREEMENT BETWEEN ARIZONA DEPARTMENT OF TRANSPORTATION AND NAVAJO TAX COMMISSION: ESTABLISHING COOPERATIVE FUEL TAX ADMINISTRATION § 3.7, May 7, 1999 [hereinafter Navajo-Arizona Agreement]) ("Provisions often address keeping records" and processes "auditing, information sharing, and disclosures."); *see id.* at 27 (citing CROW TRIBE-MONTANA TOBACCO TAX AGREEMENT, Crow Tribe-Mont. Dep't of Revenue § 7, May 13, 2005, https://mtrevenue.gov/?mdocs-file=57501 [https://perma.cc/THU4-N72N]) (discussing another example of such a compact).

120. *Sacrificing Sovereignty*, *supra* note 4, at 29 (citing NAVAJO-ARIZONA AGREEMENT at § 3.7); *see id.* (citations omitted) ("In order to accomplish this type of taxing structure, the legal incidence of the tax must fall on the wholesaler or distributer *before* the goods arrive in Indian Country for retail sale. 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.").

include administrative enforcement provisions absent any revenue sharing between the sovereigns.[121]

For example, the tribe-state tax agreements in Minnesota "provide that state sales tax is imposed on all transactions, regardless of the [tribal membership] status of a purchaser."[122] The seller remits the sales tax "in its entirety . . . . to the state," who in turn refunds the sales tax collected from Member purchases to the tribal government.[123] The state also issues a payment to the tribal government "representing fifty percent of the remaining sales tax revenue from non-member transactions from that seller," thereby "reflecting the right of the tribal government to levy taxes on both [M]ember and non-member transactions that occur on tribal reservations."[124] Similarly, the tribe-state tax agreements in Michigan generally have a provision that provides that the tribe, tribal entity, or Member who is a seller, collect and remit the state "sales tax or use tax, as applicable, on all sales to Non-Tribal Members and non-Resident Tribal Members and on all other Taxable Sales that occur within the Tribal and Trust Lands."[125] Michigan then remits part of the sales tax collected to the tribe, as that specific tribe's tax compact details.[126]

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121. *Id.* at 29; *see id.* at 29 n.180 (citing 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://www.tax.newmexico.gov/governments/tribal-governments/tribal-cooperative-agreements [https://perma.cc/WB3K-EXPN]) ("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.").

122. *See* Cynthia Bauerly, *Tax Agreements Between the State of Minnesota and Tribal Governments: A Case Study*, POL'Y DISCUSSION PAPER SERIES (Ctr. for Indian Country Dev., Minneapolis, Minn.), Nov. 2021, at 2.

123. *Id.*

124. *Id.*

125. The Sixth Amendment to the Tax Agreement Between the Grand Traverse Band of Ottawa and Chippewa Indians and the State Of Michigan § III(B), June 24, 2024. *See* COHEN'S HANDBOOK, *supra* note 1, § 18.03(1) ("As a description of property interests, 'trust land' refers to land held in trust by the United States for the benefit of a tribe or individual Indian. The land may be located within or outside the boundaries of a reservation. But courts often distinguish 'trust land' from 'fee land' when delineating areas within Indian reservations for jurisdictional purposes."); *id.* § 18.02(1)(a) ("Title to tribal lands held in fee simple is owned under the same terms as title held by non-Indians . . . . For jurisdictional purposes, however, tribal fee land may be categorized as Indian [C]ountry if it is located within a [R]eservation"); *id.* § 18.03(1) (citations omitted) ("Federal law splits title to tribal land between tribal nations and the United States. The Supreme Court has held that the United States holds 'legal title' to [R]eservation lands, with the tribal nation holding 'beneficial ownership' of the land and resources."); *see also* Johnson v. M'Intosh, 21 U.S. 543, 592 (1823) (discussing difference between "ultimate title" and "title of occupancy"); Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) (discussing trust responsibility of the United States); Worcester v. Georgia, 31 U.S. 515, 561 (1832) (discussing the trust relationship of the United States and tribal nations as akin to a sovereign state "holding [their] right of self government under the guarantee and protection of one or more allies"); United States v. Shoshone Tribe, 304 U.S. 111, 115–16 (1938) (discussing trust relationship in relation to natural resources).

126. The Sixth Amendment to the Tax Agreement Between the Grand Traverse Band of Ottawa and Chippewa Indians and the State Of Michigan § III(B), June 24, 2024.

II. Analysis

A. Why litigation is a costly and uncertain way to preempt state sales tax in Indian Country.

Tulalip Tribes v. Washington is an example of how tribes can use litigation to fight the burden of double taxation.[127] The legal framing of *Tulalip Tribes v. Washington* provides a better understanding of the importance of Tribal tax power, as it highlights arguments that State and local municipalities may use to try and discredit a Tribe's legitimate interests and thus impede on Tribal resources for self-government.[128]

In *Tulalip Tribes v. Washington*, the Tulalip Tribes (the "Tulalip"), a federally recognized Indian Tribal government, and the Consolidated Borough of Quil Ceda Village (the "Village"), a political subdivision of the Tulalip, sued the State of Washington (the "State") and Snohomish County (the "County") over taxes.[129] The United States intervened on behalf of the Tulalip and Village (collectively the "Plaintiffs").[130]

The Plaintiffs claimed that the Village transformed hundreds of acres of Trust Land into a "thriving municipality and economic center" which drove "hundreds of millions of dollars in economic activity each year."[131] The Complaint further provided that the State and the County imposed "sales and use, business and occupation, and personal property taxes" on the businesses and their customers.[132] The State and County were collecting millions of dollars annually from the taxes they imposed onto the Village businesses and patrons, the majority of which went to the State's "general fund for general statewide expenditures."[133]

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127. Tulalip Tribes v. Washington, 349 F. Supp. 3d 1046 (W.D. Wash. 2018).

128. *See Sacrificing Sovereignty, supra* note 4, at 34–37.

129. *See Tulalip Tribes*, 349 F. Supp. 3d 1046.

130. United States' Complaint in Intervention at 2, Tulalip Tribes v. Washington, 349 F. Supp. 3d 1046 (W.D. Wash. 2018) (No. 15-CV-940) ("This complaint seeks prospective declaratory and injunctive relief to protect the Tribe's right under the United States Constitution and federal law to collect tribal tax revenues within a tribally chartered municipality designed, financed, built, regulated, and managed by the Tribe and the United States on land within the Tulalip Reservation that the United States holds in trust for the Tribe, and to restrain Defendants from taxing the economic activities on these lands in a manner inconsistent with federal law.").

131. Plaintiffs' Complaint for Declaratory and Injunctive Relief at 2, Tulalip Tribes v. Washington, 349 F. Supp. 3d 1046 (W.D. Wash. 2018) (No. 15-CV-940) [hereinafter Plaintiffs' Complaint]; *see also* Maya Srikrishnan, Shannon Shaw Duty & Joaqlin Estus, *Tribes Need Tax Revenue. States Keep Taking It.*, CTR. FOR PUB. INTEGRITY (Dec. 20, 2022) https://publicintegrity.org/podcasts/integrity-out-loud/tribes-need-tax-revenue-states-keep-taking-it/ [https://perma.cc/6BF6-Q38X] ("The Tulalip invested approximately $153 million in physical infrastructure to support commerce, including roads, freshwater and sewage treatments, electrical lines, highway interchanges and a fiber telecommunication system.").

132. Plaintiffs' Complaint, *supra* note 131, at 2.

133. *Id.* (stating that the County and State, "to the exclusion of Tulalip and the Village,

The Plaintiffs filed a complaint for declaratory and injunctive relief to restrain the State and County from "administering and enforcing their taxes within the Village."[134] They alleged that the taxes unlawfully burdened the Tulalip and "commerce on the Tulalip Reservation," and were "preempted by federal law" because they "unlawfully interfere[d] with Plaintiffs' sovereign right of self-government."[135] In short, the Plaintiffs argued that the State and County taxes on non-member activity in the Village prevented the Tulalip from imposing their own municipal tax code without forcing non-members to face double taxation and higher prices—effectively displacing and nullifying "Tulalip's sovereign taxation authority with respect to those activities."[136]

The district court in *Tulalip Tribes* applied the "standard" steps in determining if the State and County taxes on the Village businesses and patrons were valid. In doing so, the district court focused on three things. First, a standard preemption test to see "if the comprehensiveness of federal regulation over the activity that is subject to taxation."[137] Second, the court looked at "the weight of the respective interests the parties have in whether the taxes at issue are allowed."[138] And third, it weighed "the value of the services the parties provide to the Quil Ceda Village customers and businesses, on whom the burden of the taxes at issue falls."[139] The second and third inquiries reflect the court's use of the *Bracker* balancing test.

First, the *Tulalip Tribes* district court found that there were insufficient federal regulatory schemes regarding the taxation of non-member transactions in non-member businesses in the Village, despite the fact that said businesses were on land leased to them by the Tulalip.[140]

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annually collect tens of millions of dollars" in taxes); *see id.* at 18 ("Pursuant to RCW Chapters 82.08, 82.12, and 82.14, Defendants administer and enforce state and county sales and use taxes on retail sales and services provided within Quil Ceda Village . . . . [I]n 2013 [the State's department of revenue] collected an estimated $37 million in sales and use taxes on activities within the Village."); *see also* Srikrishnan, Duty & Estus, *supra* note 131 ("At issue was more than $40 million the state and county were collecting annually from the [T]ribes' Quil Ceda Village shopping center while leaving the Tulalip with the bill for typical government functions.").

134. Plaintiffs' Complaint, *supra* note 131, at 3.

135. *Id.*

136. *Id.* at 21.

137. *Tulalip Tribes*, 349 F. Supp. 3d at 1050; *see also* Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685, 688–91 (1965) (discussing the preemption of state law due to clear congressional intent through the enactment of specific acts).

138. *Tulalip Tribes*, 349 F. Supp. 3d at 1050.

139. *Id.*

140. *Id.* at 1049 ("Many of the businesses at Quil Ceda Village, however, merely lease land from Tulalip, and are neither Indian-owned nor operated, and employ few members of the Tulalip Tribes."); *see id.* at 1055–56 ("If this Court were to find that these statutes provided the extent of federal regulation necessary to satisfy the standard applied in *Bracker*, state authority over nearly all economic activity within the Tulalip [R]eservation—and indeed,

Stating that the "cases are clear that the existence of extensive federal regulation in leasing on tribal land does not operate to preclude state taxation of non-leasing activities."[141]

Second, the district court looked at the weight of the interests of the State, the Tulalip, and the federal government. One of the considerations for a Tribe's interest is if a Tribe or Tribal enterprise adds "a service or adds value to a product."[142] If so, such good or service "may be immune from state taxation in that tribe's Indian [C]ountry if the balance of interests favors the tribe."[143] The district court rejected the Plaintiffs' argument that they added value to the purchasing of goods by developing the Village's shopping center into a shopping experience.[144] And while the court acknowledged that the Tulalip have "legitimate and substantial sovereign interests in the development and operation" of the Village, it found that Tulalip Member employment and Tribal economic independence was not enough to win the *Bracker* analysis,[145] as "a tribe's interest cannot be, and has not been, defined with unlimited breadth."[146]

The court focused the preemption inquiry as "one into the Tribes' interests specifically in the activity subject to taxation, and whether the challenged tax 'interferes or is incompatible with' those interests."[147] The district court's analysis of only the act of taxing non-member transactions at non-member businesses in the Village reflects a narrowing of interest similar to that of the *Atkinson* Court's constraints to the *Montana* exceptions.[148] The district court also found that even if the State's

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virtually all tribal [R]eservations—would potentially be preempted.").

141. *Id.* at 1056 (citing Gila River Indian Community v. Waddell, 91 F.3d 1232, 1237 (9th Cir. 1996)) ("'[M]ere existence of federal oversight over leasing of Indian lands' does not preempt state sales tax where 'tax would not interfere with the use and development of the Tribe's property.'").

142. CROMAN & TAYLOR, *supra* note 4, at 13; *see also* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 219 (1987), *superseded by statute*, Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988), codified at 25 U.S.C. §§ 2701–21 (1988), *as recognized in* Michigan v. Bay Mills Indian Cmty., 572 U.S. 782 (2014) (holding there was significant Tribal interest in the activity taxed because "the Tribes [were] not merely importing a product onto the reservations for immediate resale to" non-members, as they "built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the [R]eservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide.").

143. CROMAN & TAYLOR, *supra* note 4, at 13.

144. *See Tulalip Tribes*, 349 F. Supp. 3d at 1058–59.

145. *Id.* at 1058 (citations omitted) (internal quotations omitted) ("The imposition of state taxing authority at issue here is not on the Tribes' active role in generating activities of value on its reservation, but on the value of the non-tribal goods being sold, and the Tribes' interest is therefore at a minimum.").

146. *Id.*

147. *Id.* at 1058 (emphasis omitted) (citing New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983)).

148. *See infra* Part I.B.; *see also* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 657 (2001) (discussing the narrowing of the second *Montana* exception to direct effect of the specific

collection of the taxes at issue eroded the Tulalip's potential tax revenue by impairing them from imposing a Tribal tax, it did not "tip the balance" of the *Bracker* analysis in their favor.[149]

Third, while the district court acknowledged that the Tulalip provided "many of the government services available to the taxpayers while they [were] within the Village, including in particular to the [Village] businesses, which reside[d] there," it found that this too did not tip the *Bracker* analysis because the State also provided general service schemes.[150] This reasoning echoes the Supreme Court's opinion in *Cotton Petroleum v. New Mexico*, which stands for the understanding that there is no requirement that state services be proportional to the amount of taxes collected.[151] The district court doubled down on this notion, stating that "[n]othing in the case law requires an examination closer than this."[152]

The district court found that the County's police department services provided to the Village, in conjunction with the State services provided, "more than justif[ied] imposition of the taxes at issue."[153] The court also found that the State and County "provide[d] a substantial portion of services that support Quil Ceda Village and the Tulalip [R]eservation, in the form of public education, health and human services, maintenance of roads, and law enforcement and justice systems."[154]

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action taxed on a Tribe.).

149. *Tulalip Tribes*, 349 F. Supp. 3d at 1059 (first citing Barona Band of Mission Indians v. Yee, 528 F.3d 1184, 1191 (9th Cir. 2008); and then citing Crow Tribe of Indians v. Montana, 650 F.2d 1104, 1116 (9th Cir. 1981)) ("It is clear that a state tax is not invalid merely because it erodes a tribe's revenues, even when the tax substantially impairs the tribal government's ability to sustain itself and its programs.").

150. *Id.* at 1060 (citation omitted) ("These services include law enforcement, fire protection and emergency medical services, and utilities and road maintenance, at an estimated annual cost to the Tribes of $12-13 million .... The Defendants have also established, however, that both Tulalip and its [M]embers, and the taxpayers at issue in this case—the QCV customers and businesses—regularly rely on services provided by the State and County as well.").

151. *See id.*; *see also* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 185–86 (1989) (holding that there is no requirement that a state tax collected be proportional to the amount of services the state provided on-Reservation, instead positioning the question as whether there was or was not state involvement in providing services).

152. *Tulalip Tribes*, 349 F. Supp. 3d at 1062 (first citing Yavapai-Prescott Indian Tribe v. Scott, 117 F.3d 1107, 1116 (9th Cir. 1997); and then citing Gila River Indian Cmty. v. Waddell, 91 F.3d 1232 (9th Cir. 1996)) ("[T]he Supreme Court has noted that there is no requirement that a tax imposed on non-Indians for reservation activities be proportional to the services provided by the State.").

153. *Id.*

154. *Tulalip Tribes*, 349 F. Supp. 3d at 1062; *see id.* at 1060–61 (stating that the Defendants established that State sales tax and business and occupation taxes raised money for public schools, and that because a few of these schools were located on the Tulalip Reservation "it is reasonable to conclude that many of the employees and customers have been educated by the Washington public school system to at least some extent."); *id.* at 1061

Further, the court wrote that the state-provided services were a necessity for "a *civilized society* generally, and operations at Quil Ceda Village specifically," and that this "cannot be reasonably disputed."[155]

Lastly, the court discredited the Plaintiffs' arguments that the State and County taxes interfere with their sovereignty.[156] The district court in *Tulalip Tribes* stated that there is "little case law offering guidance on how a tribe's sovereignty claim should be evaluated," and the court interpreted what does exist as precedent that "counsels against a finding that the collection of taxes at issue in this case infringes on tribal sovereignty."[157] The court used two points of reasoning. The court first posited that "Tulalip's sovereignty interests [in the case] are at a minimum, where the taxes in question are keyed solely on goods manufactured off the reservation, and on transactions between non-Indians."[158] Secondly, the court stated that "the only sovereignty interest being impeded in this case is the Tribes' ability to collect the full measure

("Washington also funds and administers programs and enforces regulations related to workplace safety, worker's compensation, unemployment insurance, business licensing, and consumer protection. Such services are generally available to customers and businesses at Quil Ceda Village."). "Generally available" is an important term here because state civil regulatory power does not extend to Members on Reservation except for in extremely narrow and extraordinary circumstances. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin., 653 F. Supp. 1420, 1422 (W.D. Wis. 1987). Further, state civil regulatory power does not extend to non-members on Reservation if they are preempted, lose the balancing test, or infringe on a tribe's treaty rights. *See* Williams v. Lee, 358 U.S. 217, 223 (1959) (holding that a state does not have civil jurisdiction if such jurisdiction would hinder Indian self-governance).

155. *Tulalip Tribes*, 349 F. Supp. 3d at 1062 (emphasis added). The term "civilized society" holds great weight, and the court's use of it holds no legal significance to the case's legal analysis. It's use perpetrates the "othering" of Indigenous peoples and reflects the violent history of colonization, including the use of the Doctrine of Discovery and manifest destiny to justify the forceful "conquering" of what is now known as the United States. *See* JOHN A. POWELL & STEPHEN MENENDIAN, BELONGING WITHOUT OTHERING: HOW WE SAVE OURSELVES AND THE WORLD 4 (2024) ("'Othering' is a clarifying frame that reveals a set of common processes, conditions, and dynamics that propagate and maintain social group inequality and marginality."); *id.* at 61–62 ("The labels *Native American* or *American Indian* describe a vast and often vastly diverse groupings of peoples" who are "linked largely by the fact that they are indigenous to North America, and by a shared or similar historical experience;" collectively they are "a constitutive 'other' to the construction of the United States as a nation-state, and as such, the broad identity of Native American, however imperfect, performs critical work."); Johnson v. M'Intosh, 21 U.S. 543, 592 (1823) (discussing how the Doctrine of Discovery gave the United States "ultimate title" to Native Land); COHEN'S HANDBOOK, *supra* note 1, §§ 2.01–2.12 (providing a more detailed context and references for further general understanding on "The History of Federal Indian Law and Policy"). This Note will not touch on the linguistic history and importance of this term's use, but readers are encouraged to conduct more research on the topic if they are unfamiliar.

156. *See Tulalip Tribes*, 349 F. Supp. 3d at 1062.

157. *Id.*

158. *Id.* at 1062–63 (citing Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 157 (1980)).

of its own taxes—an interest that is essentially little more than financial."[159] These points of reasoning require setting aside the widely accepted understanding that tax revenue is essential to create, expand, and maintain governmental services (a factor the court uses in favor of the Defendants in its own balancing test), and that taxing power is an inherent right of a sovereign.[160] After an eight-day bench trial, the district court issued its opinion in favor of the Defendants[161] and the parties subsequently reached a settlement in 2020 to avoid further litigation.[162]

Tulalip Tribes is an important reminder of taxation jurisdiction's complexity in Indian Country and illustrates how courts can value State and Tribal interests in litigation. It highlights how case law regarding tribal taxation produces a complex web of fact-specific outcomes based on the membership status of the retailer and the buyers. The district court's application of the *Bracker* test shows how the test itself forces tribes to be simultaneously on the offensive and defensive in litigation and how establishing tribal interests can be unsuccessful despite extensive research, data, witnesses and expert testimony. It also shows that while litigation is an option for a tribe to get state or municipal sales tax preempted, it can be costly.[163] One of the largest takeaways from the *Tulalip Tribe* litigation is that the parties settled after five years of litigation, and from that settlement a tribe-state tax agreement was developed.[164]

B. Tribe-state tax compact components that support tribal sovereignty.

Tribe-state tax compacts are each a product of a unique political and economic landscape. It can be difficult to distill general best practices solely based on existing compacts because "what is fair for one state-

159. *Id.* at 1063; *see also id.* (citations omitted) (noting that "[w]hile this interest is valid, there is no evidence in the record that the State and County collection of taxes here has impeded the Tribes' ability to thrive financially. The governments of the Tulalip Tribes and the Consolidated Borough of Quil Ceda Village have also thrived, irrespective of the imposition of State and County taxes, as Tulalip's experts and others testified at trial").

160. *See, e.g.*, *Sacrificing Sovereignty*, *supra* note 4.

161. *Tulalip Tribes*, 349 F. Supp. 3d at 1048 ("Having heard eight days of live trial testimony in this matter, and having reviewed dozens of witness declarations and expert reports and hundreds of exhibits, the Court now finds and rules as follows."); *see id.* at 1063 ("[T]he Court hereby finds in favor of Defendants on all claims, and dismisses this case.").

162. *See* Srikrishnan, Duty & Estus, *supra* note 131; TAX SHARING COMPACT BETWEEN THE TULALIP TRIBES AND THE STATE OF WASHINGTON, Jan. 8–20, 2020 https://www.hca.wa.gov/assets/program/tax-sharing-compact-tulalip-tribes-of-wa-and-wa-state.pdf [https://perma.cc/UU6W-XPU9].

163. *See* Srikrishnan, Duty & Estus, *supra* note 131 (discussing the costs associated with the Tulalip Tribe's litigation).

164. *See id.*

tribal compact may be unfair for another."[165] The perceived pros and cons of tribe-state tax compacts may not be generally applicable due to the rich diversity of tribal needs.[166] Understanding this difficulty, the following tribe-state tax compact components are ones that have the potential to further tribal economic development, sovereignty, and help eliminate the issue of double taxation: explicit acknowledgment of sovereignty, nonwaiver of rights, communication requirements, audit processes, amendment procedures, termination procedures, and notice requirements.

A provision acknowledging the sovereignty of both parties can be included in a tribe-state tax compact to make explicit a state's respect of the sovereign status of the tribe with which it is entering into the agreement.[167] This is not always done. In his policy discussion paper for the Federal Reserve Bank of Minneapolis's Center for Indian County Development, Professor Mark Cowan examined ten tribe-state tax compacts and found that only half of them "had explicit language acknowledging the sovereign status of the tribe."[168] Federal Indian policy has shifted dramatically over the years, and these policy landscapes impact the pressure points that lead a state to agree to enter a tribe-state tax compact. Memorializing state respect for tribes' sovereign status via compact may be a proactive measure against a possible turn for the worse in Federal Indian Policy.

A nonwaiver of rights provision may bolster a tribe's legal standing and avoid a voluntary waiver of sovereign immunity argument in potential litigation.[169] A nonwaiver of rights provision can specify that "by entering into the agreement, none of the parties are waiving their rights or enlarging or reducing their taxing power or sovereignty" unless explicitly stated by the agreement.[170] A tribe may wish to include a specific and narrow mutual waiver of sovereign immunity—where both the tribe and the state agree to waive their respective sovereign immunity—for the purpose of enforcing the agreement. And a tribe could use such a provision to establish a pathway to bring suit against a state in non-compliance with the agreement.

A provision detailing communication requirements between the parties in a tribe-state tax compact can aid in preventing potential conflict

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165. Cowan, *supra* note 13, at 29.

166. *See Sacrificing Sovereignty*, *supra* note 4, at 30 (citations omitted) ("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.").

167. *See* Cowan, *supra* note 13, at 14.

168. *Id.* at 24.

169. *Id.* at 14 tbl. 1.

170. *Id.*

from reaching a point that requires litigation or outside mediation.[171] Accordingly, it may also help resolve issues in a less time-intensive manner, like the years-long litigation seen in *Tulalip Tribes*.[172] Communication requirements vary depending on the specific needs of a given tribe and state but may include the establishment of an annual meeting between the parties, defining what a formal permanent "open line[] of communication" means, and establishing protocols to maintain such lines of communication.[173]

An audit process provision can provide transparency for the parties of a tribe-state tax compact. Establishing audit processes that allow for "each government [to] audit the records of the other" can serve as a mechanism to ensure compliance where trust is absent.[174] Including practical details in an audit process provision may also proactively minimize conflict between the parties. Such details might include the identity of the auditor (a governmental actor or outside certified public accountant), timelines for audit turnarounds, and determining which party will pay for the audits.

Notice provisions are also important for maintaining transparency between the parties.[175] With state taxes being subject to change with new state legislation, a provision establishing notice requirements that mandates the state "formally notify the tribe of a change in the tax law" is likely a helpful provision.[176] Notice of changes in state tax law is especially important in compacts where the Tribe has agreed "to maintain a tax equal to the state tax,"[177] as notice ensures that a Tribe can swiftly adjust their own tax per the compact.[178] It also allows the Tribe to adjust their revenue expectations and request an audit if necessary in tax compacts where the Tribe and state split revenue from state taxes imposed on non-member activity in Indian Country.

Provisions that detail amendment procedures and termination procedures can also aid in minimizing conflict between tribal and state governments. By establishing procedures and required notice periods for agreement amendments and termination the parties have documented expectations they can rely on. This is important as economic and political realities may shift throughout the term of a tribe-state tax compact.

171. *See id.* at 28.
172. *See* Tulalip Tribes v. Washington, 349 F. Supp. 3d 1046 (W.D. Wash. 2018).
173. Cowan, *supra* note 13, at 28.
174. *Id.* at 14 tbl. 1.
175. *See id.*
176. *Id.*
177. *Id.*
178. *Id.*

Michigan, for example, uses amendments to keep their various tribal tax compacts up to date.[179]

In addition to the above provisions, tribe-state tax compacts may include a statement of purpose, definitions of terms, citations to tax laws at issue, detailed descriptions of the tax allocation process(es), and explicit mention of the taxes included and excluded in the compact.[180] Some tribe-state tax compacts have provisions on prior claims where the compact "may expressly address or exclude pre-compact tax revenue collected by [the] other government" or "no litigation" provisions in which the "parties agree to refrain from litigation over taxing jurisdiction with respect to the tax at issue for the duration of the agreement."[181] Prior claims and "no litigation" provisions can be considered by tribes entering into or amending a tax compact with a state, but their utility will be based on the sovereigns' needs. Likewise, provisions regarding dispute resolution may or may not be beneficial for a tribe depending on their terms. For example, a compact could force a tribe to remedy a wrong through a disadvantageous and possibly hostile forum, while another could provide a tribe with a favorable forum.[182] Thus, these provisions are more difficult to assess.

Relatedly, it is important to reiterate the difficulty in generalizing beneficial tribe-state tax compact provisions, as each agreement reflects tribal and state law, economic considerations and local issues.[183] Looking at various kinds of tribe-state tax compacts provides a more holistic picture of what is possible to achieve through such an agreement. And due to the difficulty of gaining access to tribe-state tax compacts generally, and compacts that pertain to sales tax specifically, existing provisions offer only a jumping off point.

C. Possible federal and state tax policy remedies for double

179. *See, e.g.*, *Grand Traverse Band of Ottawa and Chippewa Indians*, MICH. DEP'T OF TREASURY, https://www.michigan.gov/taxes/tribes/agreements/grand-traverse-band-of-ottawa-and-chippewa-indians [https://perma.cc/9XLB-4ZCY]; *Tax Information for Native Americans,* MICH. DEP'T OF TREASURY, https://www.michigan.gov/taxes/tribes [https://perma.cc/LNA9-83VY] (providing more resources, including a generic "State-Tribal Tax agreement" and specific tribes' agreements and amendments).

180. *See* Cowan, *supra* note 13, at 14.

181. *Id.*

182. *See id.* at 15–23 tbl. 2 (providing summaries of various compacts, including their respective dispute resolution provisions).

183. *Id.* at 13.

taxation.

Understanding that tribe-state tax agreements are a compromise between sovereigns, that a tribe may be subject to inequitable bargaining powers at the negotiation table, and that litigation may lead to unpredictable results—what other options are there? Both federal and state policy offer solutions that could simplify this legal mess and give both the United States and the states themselves the opportunity to voluntarily recognize and respect tribal sovereignty.

Federal tax policies offer opportunities for clarifying tribal taxing authority, while state tax policies offer opportunities to proactively build better working relationships with tribes. The United States Treasury Departments' Treasury Tribal Advisory Committee stated in a 2020 report that "[t]ax policy is key to achieving the goal of economic self-sufficiency," and that "[n]on-tribal governments and policy makers regularly fail to adequately understand or incorporate tribal fiscal prerogatives in striking fair tax apportionments."[184] The report also voiced concern that non-tribal government may at times "view Indian [C]ountry as a potential source of revenue rather than as a polity with inherent public finance requirements."[185] The best approach for federal and state governments is to include tribes in the tax policy creation, and for this involvement to tangibly and meaningfully incorporate a tribe's interests in the policy outcome.[186] Taking this into account, the policy-based solutions this Note discusses offer a variety of suggestions.

i. Federal legislative actions.

The first avenue for change could be the enactment of federal legislation that eliminates "state and local government taxation in Indian [C]ountry . . . based on the citizenship status of businesses and customers."[187] This would mean that "Tribes could be afforded the same comprehensive and exclusive tax authority that states now have in their geographic jurisdictions."[188] This kind of legislation would dramatically shift the economic realities of many tribes, states, and local

184. U.S. TREASURY DEP'T ADVISORY COMM., *supra* note 3, at 5.

185. *Id.* (citing SUSAN JOHNSON, JEANNE KAUFMANN, JOHN DOSSETT, SARAH HICKS & SIA DAVIS, GOVERNMENT TO GOVERNMENT: MODELS OF COOPERATION BETWEEN STATES AND TRIBES 1 (2d ed. 2009)).

186. *See id.* at 10 ("The Department of Treasury should, in consultation with tribes, commit resources to reviewing all tax regulations and economic policy impacting Tribal nations and develop guidance that recognizes the sovereign authority of tribes to be the sole taxing authority on their lands.").

187. CROMAN & TAYLOR, *supra* note 4, at 26. Here "citizenship status" is interchangeable with membership status as defined in this Note, and "businesses" is equivalent to this Note's use of term retailer.

188. *Id.*

municipalities, it may also "entail the transfer of responsibility for some governmental functions," between the sovereigns.[189] In enacting such legislation, Congress would eliminate the massive complex web of tribal tax case law, simplify the taxing jurisdictions, and remedy the issue of double taxation.

Congress could alternatively enact legislation exempting state tax "where a substantially equivalent tribal tax is imposed."[190] This approach would also help remedy the issue of double taxation. However, Congress's intent to exempt state tax in these instances would need to be plain and clear in the statutory language.[191] Without such explicit intent, this approach could practically result in an inconsistent elimination of double taxation across the United States.[192] Additionally, Congress could specifically act on a "subset of state taxes, such as sales or excise taxes; could permanently extend tax credits available to employers in Indian [C]ountry; [or] could broaden the availability of tax-exempt bond financing in Indian [C]ountry by giving tribes the same latitude that state and local governments have to finance [development] projects."[193] However, enacting narrower federal legislation also holds the potential for inconsistent conformity in taxing authority in Indian Country absent plain and clear statutory language.

ii. Federal administrative policy.

Establishing federal policies that "recognize[] the sovereign authority of tribes to be the sole taxing authority on their lands" is another potential—yet partial—remedy to the double taxation issue.[194] This policy would seemingly clear up the jurisdictional gray area surrounding taxation authority in Indian Country and thus remedy the issue of double taxation. Alternatively, the Bureau of Indian Affairs ("BIA") could comprehensively update the Indian Trader regulations at 25 C.F.R § 140, to create an "analysis and guidance on tax related to all business activities in Indian [C]ountry."[195]

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189. *Id.*

190. *Id.* at 27.

191. *See* Solem v. Bartlett, 465 U.S. 463 (1984) (establishing a need for Congressional intent to be clear if it diminishes Indian land or boundaries); *see also* McGirt v. Oklahoma, 591 U.S. 894 (2020).

192. *See* Pevar, *supra* note 30, at 252 (citation omitted) ("Congress may abolish a tax immunity. If the immunity was provided to the tribe by a federal law or treaty, it is considered a form of private property protected against loss by the Just Compensation Clause of the Fifth Amendment to the Constitution and, therefore, compensation must be paid to the tribe equal to the value of the immunity. The Supreme Court has held that a tax immunity will remain in effect until Congress expresses a clear intention to abolish it.").

193. CROMAN & TAYLOR, *supra* note 4, at 27.

194. U.S. TREASURY DEP'T ADVISORY COMM., *supra* note 3, at 10.

195. CROMAN & TAYLOR, *supra* note 4, at 27; *see also* U.S. TREASURY DEP'T ADVISORY COMM.,

The Department of Treasury's Treasury Tribal Advisory Committee stated additional policy recommendations in a 2020 report,[196] including that the Department of Treasury consult "with tribes [to] conduct an economic impact study for the purpose of quantifying all taxes generated by Indian [C]ountry economic development to ascertain the impact of eliminating [double] taxation barriers."[197] Such reports could provide litigation support for claims of state tax preemption by providing data showing tribal interests. With courts applying balancing tests similarly to the *Tulalip Tribes* district court, having this data could be pivotal in potential litigation, the renewal of or amendments to tribe-state tax agreements, and add further support to "the well-established fact that encouraging tribal economic development through good tax policy helps state and local economies."[198]

iii. State policy.

State legislation and policy may be better positioned to address local and context-specific circumstances.[199] States could exemplify their respect of tribal sovereignty by adopting "existing federal law and case law that recognizes tax exemptions in Indian [C]ountry, such as the BIA leasing regulations adopted in 2012 and the underlying federal statutes, which exempt significant property and activities from state tax."[200] State legislatures could also enact legislation that "eliminate[s] state and local taxes in Indian [C]ountry that are based on the [membership] status of businesses and customers."[201] A potential downside of state-based solutions is that it results in inconsistent outcomes across the United States.[202]

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supra note 3, at 10 (citing National Congress of American Indians, Resolution #Sd-15-045 (2015)) ("The Department of Interior should continue the Indian Trader Regulations (25 C.F.R §140) comprehensive update with proper government to government consultation in the compilation of the draft and final regulation. These updates should explicitly pre-empt state taxation for commerce on Indian lands; prohibit Indian country business activity from state regulation and taxation, and preserve and not interfere in tribal taxation authority over Indian Commerce.").

196. *See* U.S. TREASURY DEP'T ADVISORY COMM., *supra* note 3, at 9–11.

197. U.S. TREASURY DEP'T ADVISORY COMM., *supra* note 3, at 10.

198. CROMAN & TAYLOR, *supra* note 4, at 27.

199. Generally, states do not have regulatory authority over Members in Indian Country. *See* Williams v. Lee, 358 U.S. 217, 220–21 (1959) ("Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation," but "when 'Congress has wished the States to exercise this power it has expressly granted them jurisdiction.'"); *see also* COHEN'S HANDBOOK, *supra* note 1, § 1.03 ("Unless Congress has so authorized, states have no powers over tribal governments or Indian people within tribal nations.").

200. CROMAN & TAYLOR, *supra* note 4, at 29.

201. *Id.* at 27.

202. *Id.*

State policies offer the states an opportunity to take a step in the right direction of building working relationships with Tribes over taxing jurisdiction. And while states may be unwilling to voluntarily part with the revenue that they take from economic activity in Indian Country, doing so may be mutually beneficial. These government-to-government relationships are informed by the particular historical and present relationship between a state and a given tribe, and they are influenced by current political landscapes. However, states can benefit from strong tribal economic development, as spill over from economic activity in Indian Country increases their own economies.[203]

Conclusion

Taxing power is understood as an inherent sovereign power that cannot be taken from a tribe absent clear and plain Congressional action. Tribal taxing authority is an essential mechanism to building and maintaining economic development in Indian Country. When states impede on a tribe's ability to tax economic activity in Indian Country, they block tribes from collecting tax revenue and create a burden of double taxation. Absent clear federal statutory or policy guidance, the current case law leaves courts with the responsibility of applying balancing interest tests to determine if a state's tax on non-member transactions in Indian Country is valid. This has led, and will continue to lead to inconsistent outcomes, frustrating both states and tribes. Tribe-state tax compacts are a potential tool in remedying this jurisdictional taxation issue, albeit imperfectly.

Tribe-state tax compacts vary greatly, as tribes and tribal nations are not a monolith, and each tribe's relationship to a state is unique. While there are certain provisions that can support state recognition and respect of tribal sovereignty, they require fact-specific analysis to determine what is best for a tribe. Policy and legislation both at the federal and state level can serve as another tool in cleaning up the complex legal web of Indian tax law. Federal policy can create uniform change, while state policy can better address unique and contextual issues between a given state and tribe. However, these policies can only enact positive change if implemented with tribal interests through the meaningful consultation of tribes and tribal nations.

Tribe-state tax compacts may be the best path forward, with federal and state policy changes serving as a potential catalyst for more equitable

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203. *Id.* at 17; *see, e.g.*, Jonathan Taylor, *Economic and Fiscal Impacts of Indian Tribes in Washington*, WASH. INDIAN GAMING ASS'N (2012), https://www.washingtonindiangaming.org/wp-content/uploads/2018/04/wigaeconseptupt3.pdf [https://perma.cc/C37P-3SKM] (describing the economic benefits of tribal economic growth to the state of Washington).

power between the sovereigns. More research is needed to collect data on the impact of tribal economies on their bordering states. A database of current tribe-state tax compacts should be developed by the BIA or Department of Treasury to provide tribes, states, and practitioners with better data to understand the economic realities of relationships between sovereigns. Lastly, a comprehensive comparative analysis of these tax compacts would provide more informational data points on the details of how these agreements have taken, and continue to take form, and thus enable states and tribes to enter tax compacts. With much work yet to do, this Note is an attempt to consolidate a vast and complex area of law so that it may serve as a tool for practitioners.